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REPORTS OF CASES  
DECIDED IN THE  
SUPREME COURT  
OF THE  
STATE OF NORTH DAKOTA

MAY, 1911, TO SEPTEMBER, 1911.

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F. W. AMES  
REPORTER

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VOLUME 21

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**JUL 24 1912**



**OFFICERS OF THE COURT DURING THE PERIOD OF  
THESE REPORTS:**

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**HON. D. E. MORGAN, Chief Justice.**

**HON. BURLEIGH F. SPALDING, Judge.**

**HON. CHARLES J. FISK, Judge.**

**HON. E. B. GOSS, Judge.**

**HON. E. T. BURKE, Judge.**

---

**F. W. AMES, Reporter.**

**R. D. HOSKINS, Clerk.**



## JUDGES OF THE DISTRICT COURT.

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District No. One,  
CHARLES F. TEMPLETON.

District No. Three,  
CHARLES A. POLLOCK.

District No. Five,  
J. A. COFFEY.

District No. Seven,  
W. J. KNEESHAW.

District No. Nine,  
A. G. BURR.

District No. Eleven,  
FRANK FISK.

District No. Two,  
JOHN F. COWAN.

District No. Four,  
FRANK P. ALLEN.

District No. Six,  
W. H. WINCHESTER.

District No. Eight,  
K. E. LEIGHTON.

District No. Ten,  
W. C. CRAWFORD.

District No. Twelve,  
S. L. NUCHOLS.

▼



## CONSTITUTION OF NORTH DAKOTA.

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SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF  
NORTH DAKOTA

---

GEORGE FREEMAN ET AL. v. JOHN TRIMBLE ET AL.,  
as Drain Commissioners of the Counties of Bottineau and McHenry.

(129 N. W. 83.)

**Drain Commissioners — Powers.**

1. Boards of drain commissioners have only such powers as are expressly conferred by statute, or necessarily implied from powers conferred.

**Drains — Power of Commissioners — Discretion.**

2. In acting as drain commissioners, a large discretion is vested in them in assessing benefits and in determining when outlets for drains may be secured, and that discretion will not be interfered with where power is granted to them, except in case of fraud or manifest abuse of such discretion.

**Drainage Boards — Drains — Securing Outlet in Foreign Territory.**

3. Under §§ 1821 and 1822, Rev. Codes 1905, as amended by chapter 93, Laws of 1907, joint boards of drain commissioners have power to secure an outlet to drains established within their district, in foreign territory, where a public necessity exists for securing such outlets.

---

Note.—It being settled that drainage is one of the things which comes legitimately within the powers of the government, and that the expense of it may be met by taxation, the proper procedure for the establishment of drains and sewers and the validity of such proceedings become an important question to the people to be charged with the expense. This question is reviewed in an elaborate note in 60 L.R.A 161.

21 N. D.—1.

**Drains — Outlet in Foreign Territory — Powers of Drain Commissioners.**

4. Where it is necessary to improve, deepen, or widen the channel or bed of a river in this state in order to drain flooded lands, and the deepening and widening of such river in this state would not be effectual in draining such lands, without deepening and widening the river bed for about 12 or 14 miles after it passes into Canada, the drain commissioners have power to secure a suitable outlet by improving the river after it passes into Canada.

**Drains — Control of Improvement after Completion — Foreign Outlet — Contract with Foreign Municipality.**

5. In such a case, the fact that the control of the improvement after its completion is not vested in the county commissioners, but in the council of the municipality through which the river passes, in Canada, by virtue of a by-law of said municipality and a contract between it and the board of drain commissioners, does not defeat the right of the drain commissioners to secure such outlet by improving the river bed.

**Drains — Outlet in Foreign Territories.**

6. Section 1823, Rev. Codes 1905, as amended in 1907, making it necessary to secure the right of way to land through which drains in this state pass, has no application to improvement of water courses for drainage purposes.

**Drains — Foreign Outlet.**

7. Improving a water course after it passes beyond the drainage district for 12 to 14 miles into foreign territory, for the purpose of making an improvement of the water course in this state efficacious, is not an unreasonable exercise of the power of securing an outlet for drain purposes.

**Drains — Assessment of Benefits.**

8. The general principle that land benefited by a drain equally with other land, that is assessed for such benefits, shall not be arbitrarily omitted from such assessment, is not applicable where land in foreign territory is not, and cannot be, assessed for benefits incident to the construction of the drain in the drainage district that is assessed.

Opinion filed January 21, 1910.

Appeal from the District Court of McHenry county; *Templeton, J.*, by request.

Action to restrain the joint board of drain commissioners of McHenry and Bottineau counties. Order restraining joint drain board granted. Defendants appeal.

Reversed.

*Geo. A. Bangs*, for appellants.

Drainage boards can construct drains, and for outlets may go beyond their territorial limits, and expend money, the benefits at all times to exceed the expenses. 28 Cyc. Law & Proc. p. 954; 10 Am. & Eng. Enc. Law, p. 247; 1 Dill. Mun. Corp. 446; Tiedeman Mun. Corp. 201 & 294; Elliott, on Roads & Streets, 505; 2 Lewis's Sutherland, Stat. Constr. 508 & 511; *People ex rel. Murphy v. Kelly*, 76 N. Y. 487; *Re New York*, 99 N. Y. 584, 2 N. E. 642; *Cochran v. Park Ridge*, 138 Ill. 300, 27 N. E. 939; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704; *Ryder v. Alton*, 175 Ill. 94, 51 N. E. 821; *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105; *Church v. People*, 179 Ill. 205, 53 N. E. 554; *Gillison v. Cressman*, 100 Mich. 591, 59 N. W. 321; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, 95 N. W. 94; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 890; *McBean v. Fresno*, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; *Manning v. Devils Lake*, 13 N. D. 47, 65 L.R.A. 187, 112 Am. St. Rep. 652, 99 N. W. 51; *Washer v. Bullitt County*, 110 U. S. 558, 23 L. ed. 249, 4 Sup. Ct. Rep. 249; *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

*Skulason & Burtness*, for respondents.

Drain proceedings are statutory, and statute must be strictly followed. *Gable v. Deal*, 150 Mich. 430, 114 N. W. 214; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211; *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851; *Witty v. Nicollet County*, 76 Minn. 286, 79 N. W. 112; *Dill. Mun. Corp.* 445, 446; *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139.

Board cannot construct drainage outlets beyond its own territorial limits. 28 Cyc. Law & Proc. pp. 266, 605, 703; *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747; *Thompson v. Moran*, 44 Mich. 602, 7 N. W. 180; *Cooley, Const. Lim.* 176; *Tiedeman, Mun. Corp.* § 338, p. 676; *Becker v. La Crosse*, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84; *Cooley, Const. Lim.* 176; *Alger v. Slaght*, 64 Mich. 589, 31 N. W. 531; *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711;

Hubbell v. Robertson, 65 Mich. 538, 32 N. W. 811; Lager v. Sibley County, 100 Minn. 85, 110 N. W. 355.

MORGAN, Ch. J. This action involves the validity and legality of a drainage project instituted under chapter 23, Rev. Codes 1905, as amended by chapter 93 of the Laws of 1907. The plaintiffs are residents and freeholders of McHenry county, whose lands will be affected by the construction of the proposed drain. The defendants are members of the board of drainage commissioners of the county of McHenry and the members of the board of drainage commissioners of the county of Bottineau, acting as a joint drainage board of said counties, through both of which counties the proposed drain passes.

The complaint alleges, in substance, the following facts: That the defendants, acting as a joint board of drainage commissioners of the counties of McHenry and Bottineau, held a meeting on the 1st day of June, 1908, for the purpose of establishing a drain through the counties of McHenry and Bottineau, and thereafter said joint board attempted and pretended to assess the lands of the plaintiffs for the purpose of constructing said drain, designated as Mouse River Drain No. 9. In the complaint, it is further alleged that no legal petition was ever presented to said drainage boards of either of said counties, nor to said joint board, signed by freeholders of said counties, whose property is to be affected by the drain, and that, in consequence of such fact, no authority whatever was conferred upon the defendants to act in reference to the establishment of said drain. The invalidity of the acts of the joint board of drainage commissioners is based upon the alleged fact that the drain was not to be established as described in the petition of the freeholders of said counties, but the same was to be constructed and established by widening, deepening, and clearing out the channel of said Mouse river after it had crossed the International Boundary Line between Bottineau county and the province of Manitoba, and extending such improvement into Canada for a distance of about 12 miles beyond the said International Boundary Line.

The complaint further alleges that said joint board of drainage commissioners is about to submit the proposition of the construction of said drain to contractors to do the work for the lowest bid, and was about

to enter into a contract for the making and constructing of said drain with the lowest bidder.

The relief asked is that said board be permanently enjoined from entering into such contract, and from doing anything further toward the establishment of said drain.

The judge of the district court of the ninth judicial district issued a preliminary injunction against said joint board of drainage commissioners, restraining it from entering into any contract for said purpose until a further order of the court. Upon the return day of the order to show cause why said drainage commissioners should not be permanently restrained from further proceedings in reference to the construction of said drain, the parties appeared before the judge of the first judicial district, acting by request of the judge of the ninth district, and, after a hearing, the preliminary injunctive order was continued in force. From this order the defendants have appealed.

In the trial court the facts were stipulated by the parties, and are, in substance, as follows: The proceedings of the drainage boards are not in any way attacked except so far as the joint board is attempting to act outside of the limits of the state of North Dakota, and within the Dominion of Canada, in reference to widening and deepening the channel of said Mouse river after it enters into Canada. So far as such acts are concerned, the plaintiffs contend that they are wholly unauthorized, and that there exists no power, express or implied, in the drainage board to perform such work.

The facts stipulated are here only summarized. It appears that about 22,000 acres of land in McHenry and Bottineau counties have become flooded by reason of the clogging up of the channel of the Mouse river, and, in consequence of that fact, this land has become to a great extent useless for agricultural and grazing purposes. The Mouse river enters the state of North Dakota in the eastern part of Ward county, and thereafter flows in a southeasterly course for about 65 miles from the International Boundary Line. It then changes its course to an easterly, and afterwards gradually to a northerly, and thereafter to a northwesterly, direction until it reaches the International Boundary Line at a place about 40 miles east of its entrance into the state of North Dakota, and after having passed through McHenry and Bottineau counties since it left Ward county. The

object of the drainage project is to reclaim this land by deepening and widening the river bed and channel throughout its course for about 30 miles south of the International Boundary Line, and making such deepening and widening of practical utility by securing a sufficient outlet for the accumulated water by deepening the channel of the river after it flows into Manitoba.

The county commissioners of said counties of McHenry and Bottineau each appointed a drainage board for their respective counties, and these two boards were duly and regularly petitioned by residents and landowners interested, to establish a drain by improving the channel of the river, as before stated, within said counties. Each of these drainage boards employed the state engineer of the state of North Dakota, who made an examination of the river and the flooded lands, and thereafter made a report to said boards to the effect that such lands could be reclaimed and the water drained from them by deepening the channel of the river and by widening the river bed where there are sharp curves in its course. These two drainage boards made an examination of the proposed drain within their respective counties, and by resolution declared that such drain was necessary for the public good. Thereafter these boards met as a joint drainage board for said counties, and duly organized, and employed said state engineer to prepare plans, profiles, and plats of the lands to be drained, and by resolution declared such drain to be necessary for the public good. Thereafter said engineer filed a report with the joint drainage board, and said board fixed July 10th, 1908, as the day when objections to the proposed drain would be heard; and on said day, said board declared by resolution that the drain was a public necessity, and that its cost would not exceed the benefits to be derived therefrom. On that day, said board also made an order designating the commencement of said drain, its course, and terminus, and its name to be "Mouse River Drain No. 9." In such order it was declared that such drain was a public necessity, and for the public good and health.

In his report the state engineer recommended and advised that the terminus of the proposed drain be changed from the course petitioned for, and established by the respective county drainage boards; and the joint board by resolution declared that the recommendations of the engineer should be followed, and that the drain in the river was to be

extended to the mouth of North Antler creek, where it empties into the Mouse river, about 12 to 14 miles north of the International Boundary Line, in Canada. The report of the engineer showed that it would be useless to deepen and widen the river bed and channel in McHenry and Bottineau counties, unless the river was improved on the north side of the boundary line in Canada, for the purpose of making an outlet for the accumulated water at or near the boundary line.

It is also stipulated that the total cost of such drain will be approximately \$142,000, of which about \$70,000 will be required to do the work in Canada to provide such outlet for the water on the flooded land in McHenry and Bottineau counties. It is also stipulated that Mouse river is not a navigable stream.

The territory across the boundary line through which the improvements of the river bed are to be made is within the "Rural Municipality of Arthur," and is under its governmental control. This municipality passed a by-law in reference to the improvement of the river by the joint drainage board, known as "By-law No. 372," and such by-law was enacted by the council of said Municipality of Arthur, pursuant to § 557 to 577 of the "Municipal Act" of the Dominion of Canada. There is nothing in the record showing the precise power of the officers of the said "Rural Municipality of Arthur." It appears that such municipality is governed by a council, and that, in enacting the said by-law, the officers or council were acting under the general "Municipal Act" of the Dominion of Canada. Said by-law recites that certain lands in McHenry and Bottineau counties in North Dakota are covered by water to such an extent as to render the same unfit for use. It also recites all the proceedings that had been taken by the drainage boards of these two counties, and by the joint drainage board thereof. The course, commencement, and terminus of the proposed drain is stated in the by-law. It also recites that certain lands within said Municipality of Arthur would be beneficially affected by the construction of said drain, and such lands are specifically described. It also recites that a certain portion of the owners, and such portion as is required by statute, had petitioned that the authorities of Bottineau and McHenry counties be permitted to construct such drain, provided that the cost of the construction and completion of such drain should be entirely borne by the owners of the land situated in

the counties of Bottineau and McHenry; and providing, further, that said drainage works and improvements in said river, situated within said municipality, should, when completed, be controlled by the Rural Municipality of Arthur, in the Province of Manitoba. It is further provided in said by-law that the Reeve and Secretary-Treasurer of said municipality be authorized to enter into and execute, under the corporate seal and on behalf of said municipality, a contract to secure the construction and completion of said improvements, and in regard to the proper maintenance of the same and the carrying out of the provisions of said by-law. Such a contract was duly entered into between the Rural Municipality of Arthur and the joint board of drainage commissioners, on February 24th, 1909. In said contract, the provisions of said by-law No. 372 are recited, and the contract specifies that the municipality permits and suffers said drainage commissioners to construct the said drainage works and make the said improvements in the Mouse or Souris river, northward from the International Boundary Line to the mouth of North Antler creek, in accordance with the plans and specifications prepared by the state engineer of the state of North Dakota. The contract further provides that the commissioners are bound to improve the river and complete such improvements in a good and workmanlike manner, and to keep the same in repair without charge or cost to the Municipality of Arthur, and that the commissioners are to assume and pay all damages or losses which might accrue or arise in consequence of the construction of said improvements, and that the said municipality is to be at all times made harmless on account of making of such improvements or the maintenance thereof, and that all improvements by reason of the construction of said drain in the river north of the International Boundary Line is to be controlled by the Municipality of Arthur and maintained by said commissioners of McHenry and Bottineau counties.

The plaintiffs urge the following grounds against the validity of the proposed action of the joint drainage board:

1. Control of the drain, and title to the right of way to same, are reserved to the Rural Municipality of Arthur, contrary to the provisions of the drainage statutes of this state.
2. That benefits are conferred on lands in Canada, which are not assessed for such benefits.



3. No power exists in drainage boards to secure an outlet to drains in foreign territory.

4. If power exists in drainage boards to secure an outlet in foreign territory under some circumstances, the outlet to be secured is an unreasonable distance beyond the limits of the drainage district in this case.

The district court held that the extension of the drain into Canada was unauthorized and contrary to law, upon the first and second grounds enumerated above, and overruled the contentions of the plaintiffs upon the fourth ground, and expressed no opinion upon the third ground urged.

Each of these objections to the validity of the drainage proceedings presents questions of grave and far-reaching importance. If the drainage board be not restrained from further proceedings, the owners of these flooded lands are irreparably and injuriously affected, as there is no other plan by which their lands can be drained and rendered of use for agricultural purposes. The health of the whole community may also become affected if the water is permitted to stand on such a large area. On the other hand, if no power exists in the board to perform the necessary work outside of the territory over which they have control, the question of injury should not be considered, as greater abuses and injury may follow by permitting the assumption of power not granted, than would follow if the drainage board be now restrained.

Unless authorized by statute, under a fair and reasonable construction of its provisions, no power exists in the board to do this work beyond its own territory. In other words, drainage boards are creatures of statute, and they have no powers except such as are expressly granted by the statute or reasonably implied from the powers granted. If such power exists, it is by virtue of §§ 1821 and 1822, Rev. Codes 1905, as amended by chapter 93 of the Laws of 1907. Section 1822, so far as material, reads as follows: "If it shall appear that there was sufficient cause for the making of such petition, and that the proposed drain will not cost more than the amount of the benefits to be derived therefrom, the board of drain commissioners shall thereupon make an order establishing the drain, accurately describing it, and give the same a name by which it shall be recorded and indexed."

On the part of respondents it is contended that this section grants the power to establish drains only in territory within its jurisdiction, and that it confers no authority to extend the proposed drain into foreign territory. The appellants contend that it grants power to extend the drain into any territory in case it becomes necessary to do so, when such extension can be made without committing a trespass or violating any law, and when the cost of the same, together with the cost of the main drain, does not exceed the benefits to the land to be drained within the district.

Under certain circumstances, the board is authorized under said § 1821, Rev. Codes 1905, as amended in 1907, to vary from the line described in the petition, and when the land described in the petition does not give sufficient fall to drain the land, the board may extend the line below the outlet named in the petition; and authority is given to clear out and straighten out channels far enough to obtain a sufficient outlet. That section reads as follows: "When the length of the line described in the petition does not give sufficient fall to drain the lands sought to be drained, the board of drain commissioners may extend the drain below the outlet named in the petition, far enough to obtain a sufficient fall and outlet." In his report the engineer states that "the length of the drain described in the petition did not give sufficient fall to drain the land sought to be drained, and that in order to obtain sufficient fall to drain said lands, such drain must be extended into Canada a distance of approximately 15 miles." In his report, the engineer advised the drainage board to vary the terms of the drain as petitioned for to that extent, and the board, by resolution, adopted such recommendation.

The power to establish drains would often be of no beneficial use whatever if the drainage boards must stop all the work at the boundary line of their districts. In this case the drain proper, being the river, is not in foreign territory. The drain is in McHenry and Bottineau counties. To find an outlet the board was forced to secure it by dredging and widening the river in Canada, or entirely abandon the project. We think the power to secure an outlet outside of the drainage district is necessarily implied from the power to establish a drain up to the boundary line in Bottineau county. The construction contended for by the respondents is too strict. It, in effect, requires reading into

the statute that a drain cannot be extended to find an outlet outside of the district. It means, in effect, also, that a drain cannot be constructed within the district if it becomes absolutely necessary, to make such drain of use, to secure an outlet outside of the district. What is here said in reference to said section is also applicable to § 1835, Rev. Codes, 1905, pertaining to improvement of streams for drainage purposes.

In *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704, the court said: "It is insisted by appellants that no right of way for this easterly extension has been or can be obtained by the village authorities, and therefore the whole proceeding is illegal, the position being that the corporate authorities of a city or village can exercise no power beyond its limits in the construction of a local improvement like the one in question, our statute conferring upon them no such right. The village, in this case, claims the right to pass over the private property east of its limits by deed from the owner, but whether it has such right or not, in our opinion, is immaterial as to the validity of the assessment in question. The simplest form in which the question raised can be considered is, Can a valid ordinance be passed by a village to extend a sewer beyond its limits? No ordinance for a local improvement is valid which does not describe the improvement contemplated, and, therefore, if in that description it shows an attempt to do that which it is not authorized to do, the ordinance is void on its face. The general doctrine that a municipal corporation can only exercise its powers within its corporate limits is conceded. The rule is founded on the fact that, generally, no authority is given by their charters to act beyond such limits, and hence corporate authorities are restricted in that regard, as in all other attempts to exercise corporate authority, by the general rule that they can exercise only such powers as are granted by express words. This general rule has, however, the qualification that such authorities may also do those things which are 'necessarily or fairly implied in or incident to the powers expressly granted.' We have already decided that a village may lawfully extend its sewers beyond its limits for the purpose of securing a suitable outlet for the same. *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815; *Cochran v. Park Ridge*, 138 Ill. 295, 27 N. E. 939. In such case the improvement is within the corporate limits and for the exclusive use

and benefit of the municipality. The extension and outlet only serve the purpose of giving practical effect to the sewer or system of sewerage. No one will deny that a sewer in a city or village is a local improvement, within the meaning of § 1, art. 9, chap. 24, of the Revised Statutes. Hence, the power to construct it under the provisions of that article is expressly given, and the right to also provide suitable outlets for the same, even outside of its boundaries, must result by fair and necessary implication, otherwise the express power would in many instances be unavailing."

In *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601, the court said: "The general doctrine is clear that a municipal corporation cannot usually exercise its powers beyond its own limits. If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the legislature to grant such power. The commonest instances are where a supply of water can only be obtained from a distance. . . . There seems to be no reason why an outlet should not be sought elsewhere, provided the charter furnishes the means of obtaining one, expressly or by fair implication. If it can only be obtained by building a sewer or ditch beyond the city, the charter seems to be defective, in making no express provision for such works. But if by leading a sewer or ditch to the city limits it can be connected with an outlet beyond, there would seem to be no reason for preventing such connection. Drainage is a public necessity."

In *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249, the court said: "The power conferred upon the county court by the statute of Kentucky to erect and keep in repair necessary public bridges includes within its terms a bridge across the county boundary, as well as one wholly within the county limits. Unless, therefore, there is other legislation which modifies the power thus conferred, the authority of Bullitt county to contract for the erection of the bridge in question is plain."

In *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 74, 111 Fed. 972, the court said: "Nor is any reason perceived why a portion of the improvement should not have been made on land without the city. The scheme was to drain the city and thereby to

benefit the property thereof and to protect the health of its inhabitants. To accomplish this, it was necessary to extend the drainage beyond the city limits, in order to obtain a proper outlet. A city council undoubtedly has the power, if it be granted the authority to make such improvement, to make it efficacious by extending it as far as necessary beyond the corporate limits."

In *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, the court said: "Nothing is here but the question of power; if it existed, we must so declare. The responsibility for its exercise is not ours. It appears to be conceded and has not been denied that the acquisition and maintenance of public parks, securing pure air and healthful rest and recreation to the people, is a city purpose when executed within the corporate limits, and the sole contention is that it ceases to be a city purpose when in any degree or to any extent it moves outside of those boundaries. What is the change which transforms the inherent nature and character of a city purpose when it passes the municipal lines, we are told by the grouping of extreme consequences foretold as possible results."

In *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815, the court said: "The extension of the sewer south in the town of Lyons, from thirty-ninth street to Mud Lake cannot be regarded as a local improvement in another town. Suppose no outlet could be found without extending the sewer a short distance into the territory of another town. We think the town authorities would be authorized in such a case to do so, without a violation of the rule announced in the case cited."

The following cases announce the same general principles. Whereas no one of the cases is based upon facts where the corporate authorities did work or secured outlets for sewers or drains in territory outside of the United States, we do not see that the question of power should be limited in case of necessity, in cases of going outside the limits of the United States, any more than in extending the power by going beyond the boundaries of cities, counties, or townships for outlets. 28 Cyc. Law & Proc. p. 954; 10 Am. & Eng. Enc. Law, p. 247; 1 Dill. Mun. Corp. 446; Elliott, Roads & Streets, 505; *Lester v. Jackson*, 69 Miss. 887, 11 So. 114; *Gillison v. Cressman*, 100 Mich. 591, 59 N. W. 321; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, 95 N. W. 94; *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Beasley v.*

Gravette, 86 Ark. 346, 110 S. W. 1053; Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486; Haenssler v. St. Louis, 205 Mo. 656, 103 S. W. 1034; McBean v. Fresno, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358.

Our conclusion upon this point is that the drainage board had authority, under a reasonable construction of the statute, to expend money for the improvement of the Mouse river for the distance stated in Canada, as a public necessity, for the benefit of the landholders in Bottineau and McHenry counties. If a reasonable construction of the statute did not authorize the board to go beyond the limits of the district, we think it clear under the authorities cited, that such power was clearly implied from the express power granted such boards to establish drains within their districts.

It is claimed that there will be an abuse of the power in this case in extending the work of improving the channel 12 to 14 miles beyond the boundary line. This is presented as a ground for restraining the board, conceding for the purposes of the case that the power to establish an outlet in foreign territory exists. From the record it appears that it will be necessary to improve the river to that extent to secure an effective outlet. Without going that distance the improvement within the counties of McHenry and Bottineau would be entirely ineffectual, and would not result in relieving the flooded lands of the water gathered thereon. Inasmuch as we have concluded that such power exists in the board to go beyond the limits of the district in cases of necessity, we do not see that there was any abuse of the power under the circumstances of this case. The question as to what is a reasonable distance depends upon the facts of each case. What may be a reasonable distance under one state of facts might be deemed unreasonable under another and different state of facts. As stated by the trial court in its opinion, the term "reasonable distance" is a relative term, and that court determined that the board did not exceed what would be deemed a reasonable distance under the facts of this case. Determining to what distance it becomes necessary to go to find an outlet to accomplish the purpose desired is a question of policy for the consideration of the board, and the determination of the board in such cases will not be interfered with except in cases of fraud or manifest abuse.

It is next urged that the proposed improvements should be restrained as contrary to the provisions of the statute, for the reason that they are to be under the control of the Rural Municipality of Arthur after their completion. The by-law provides that such improvements within the Municipality of Arthur "shall, when completed, be controlled by the Rural Municipality of Arthur, . . . and shall be maintained by or under the supervision of the joint board of drain commissioners."

Under § 1842, Rev. Codes 1905, all drains situated in this state are to be under the charge of the board of county commissioners, and are by them to be kept open and in repair. From the provisions of this section it is argued by the respondent that it has been violated by the contract entered into between the Rural Municipality of Arthur and the joint drainage board of the two counties named. Under the express language of said section, its application is limited to drains constructed in and situated within this state. We do not think that it was the intention of the legislature to say that its provisions should be applicable under the circumstances of this case; that is, where the outlet is only sought in foreign territory by widening a stream. No statute makes such control necessary where a stream is widened for drainage purposes or to secure an outlet. If absolute control of streams be required as a condition precedent to securing outlets in a foreign country, such outlets, in most cases, could not be acquired.

If the contemplated improvement was to consist of a permanent building or other fixture, a different question would be presented. It is not necessary to pass upon that question, as it is not presented in this case. The so-called improvements to be made in this case consist of dredging the river, and widening and deepening the channel. Although the work or improvement under consideration is called a drain in the pleadings and other papers, it is not in reality a drain in the common acceptation of that term. The contemplated improvement is in part governed by § 1835, Rev. Codes 1905, which reads as follows: "The powers conferred by this chapter for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed; also to straightening, clearing out, and deepening the channels of creeks and streams, and the construction, maintaining,

remodeling, and repairing of levees, dykes, and barriers for the purpose of drainage, and the board of drain commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made; but no proceedings affecting the right of persons or property shall be had under this section, except upon the notice, hearing, and award prescribed in this chapter for the construction of drains in the first instance."

The improvement in this case consists in dredging, deepening, widening, and straightening the river bed and channel; and, whenever the course of the river is changed, the persons owning land through which the river will flow where its course is changed after crossing the boundary line have petitioned for and consented to such change. No objections to these proceedings have been made by anyone on the ground that land owned by persons along the stream is being taken without their consent. The same principles do not apply in this case as in cases of drains through land independent of a stream. When these improvements are completed, there will be nothing there that has not always been there. The river will be there, and nothing more. There is no control of the river bed or channel vested in the county commissioners within their respective counties, even, as against the rights of riparian owners. When, therefore, a river bed or channel is improved for drainage purposes, the control thereof is not with the county commissioners, but remains where it has always been, with the riparian owners, subject to the rights of upper and lower owners along the stream to a reasonable use of the water therein for certain purposes. We do not think that the by-law of the municipality or the contract was of any effect so far as control of the drainage commissioners over the stream is concerned. And though the cost of improving the river in Canada is incurred in connection with the drain as constructed in Bottineau and McHenry counties, and is assessed against such lands, we fail to see that the fact as stated in the contract and by-law that control shall remain in the municipality is any ground for restraining all further acts by the joint board. Under the by-law, the right of the joint board to maintain the drain in the river is guaranteed. By this nothing less can be meant than that the river is in charge of the joint board for purposes of keeping it in repair and maintaining it.



We do not think that the argument of the respondent, to the effect that the drainage board has assumed to become responsible for all future damages on account of the maintenance of the drain, presents a question of power. That question is one more of policy or expediency than of power. In view of the fact that the Municipality of Arthur, by a by-law, consents to the making of the improvements, and in view of the fact that the owners of the land across the line have petitioned for the improvement, we think that the danger of future interference with the joint board in maintaining the improvement is slight, if not altogether out of the question, and too remote for consideration.

What has been said in regard to the consequences following the fact that control of the improvement is not vested exclusively in the county commissioners is controlling on the point urged against the validity of these proceedings, for the alleged reason that the right of way to the river channel in Canada was not secured by the drainage board. The statute provides that the county commissioners shall acquire the right of way, and that it shall be the property of the county. § 1823, Rev. Codes 1905. We do not think that this section is applicable, or intended to be applicable in cases of improving natural water courses for drainage purposes. In this case the joint drainage board is concerned only in securing right to increase the flow of the river in the counties of Bottineau and McHenry, and this fact has naught to do with the title to the land through which the river flows.

The next contention on behalf of the plaintiffs and respondents is that the proceedings of the drainage boards are null and void, and should be restrained permanently for the reason that certain lands in Canada are materially benefited by the construction of the drain, without any assessment being levied thereon to pay for such benefit; and that the cost of such improvement, resulting in such benefits to these lands, is assessed against the land of the plaintiffs. The question whether the lands in Canada are materially benefited by the construction of this drain is not conceded by the appellant. In fact, it is strenuously insisted by them that these lands will only be benefited to a trifling extent. The engineer, in his report, states in respect to the amount of land to be benefited in Canada, as follows: "There is a very small amount of land between the International Boundary Line and the C. P. Ry., 6 miles north, that may possibly be benefited to a

small extent, but this land is very alkali and also very stony, and would be practically of no value even if it was drained. The land north of the C. P. Ry. in Canada down to the North Antler creek, the terminus of our proposed drain, lies so much higher than the stream does that there will be no benefit accruing to this land." The drainage board, acting under such report of the engineer, considered this question of the amount of land to be benefited in Canada, and found, after investigation, that there was but "small acreage to be benefited incidentally thereby." There is much force in appellant's contention that this finding of the board is conclusive on all persons making only a collateral attack on that finding, as in this case.

However, the rights of the parties on this appeal will be determined on the theory that the lands on the north side of the boundary line will be materially benefited, by the construction of this drain. The trial court was impressed with the fact that such lands will be materially benefited, and held all the proceedings void for the reason that the cost of constructing the drain north side of the line was assessed against the lands of the plaintiffs and other owners of lands benefited in McHenry and Bottineau counties, and that none of the cost was assessed against the lands benefited on the north side of the boundary line. This conclusion of the trial court was reached upon the assumption that assessments must be equally borne by the land, in proportion to benefits to all the benefited land, whether within the district or beyond the limits of the district. It is true that the intentional omission from assessment for benefits, of land benefited, in a drainage district, will sometimes wholly vitiate the whole assessment, although there is a large discretion vested in drainage boards as to what benefits are to be assessed; and this discretion will not, except in case of fraud or abuse, be interfered with. No question of wilful omission of lands within the drainage district is presented in this case, and the general rule applicable in such cases it is not necessary to define. In this case the land in Canada was not assessed for benefits, and could not, under any circumstances, be assessed for benefits by the drainage boards of Bottineau and McHenry counties. The power to assess such lands rests wholly with the authorities in the Dominion of Canada. The question is therefore presented: Must all these contemplated improvements be abandoned for the reason that assessments of benefits

accruing to lands in Canada is impossible, because the drainage board possesses no authority to levy assessments beyond the limits of its district? The improvement in this case is not undertaken for the benefit of the owners of land situated in Canada. The sole purpose of the petitioners is to secure the drainage of their own lands, situate in Bottineau and McHenry counties. It clearly appears that the expenditure, although large, does not exceed the aggregate benefits. The ratio of the assessment per acre is very small compared to the benefits that will accrue to the land if the project can be maintained. It being undisputed that the purpose of the proceedings is to benefit lands in Bottineau and McHenry counties, should the fact that lands beyond the limits of these counties, in Canada, are materially benefited, nullify all the proceedings and subject them to be perpetually restrained? The trial court so held upon the general principle of the law before stated, relying upon the case of *Masters v. Portland*, 24 Or. 161, 33 Pac. 540, as sustaining that principle. That case was in reference to a different state of facts. Lands within the assessment district were wilfully, arbitrarily, and intentionally omitted from the assessment, although materially benefited, and benefited equally with the assessed lands in the same district. No such question is presented here, inasmuch as it was beyond the power of the drainage board to include the lands in Canada in the assessment or apportionment of benefits.

The respondent also relies on *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139, to sustain this contention. That case also presents a question of the intentional omission of benefited lands from assessment, which was within the jurisdiction of the assessing body. It is not, therefore, in point under the facts of this case. No other cases are cited on this point.

The direct object sought in these drain proceedings is to improve the lands within the drainage district as petitioned for. It is undisputed that the total benefits to the lands within the district in Bottineau and McHenry counties exceed the total cost of the improvement in these counties as well as in Canada. Work is to be done in the Dominion of Canada for the express purpose of benefiting land within the drainage district in said counties. The benefit to the lands in Canada is one of the indirect or incidental results of the work absolutely necessary to be done for the improvement of the lands in these

counties. The situation is the same, and presents a similar question as would be presented if the drainage board in these counties was compelled to go into Canada to secure stone, or some other material necessary to be used in improving the river bed in Bottineau county, and the removal of such material from Canada materially benefited a large tract of land in Canada. No doubt of the power of the board to secure such material would be entertained. It would not be contended, seriously, that the land in Canada must be assessed for these benefits proportionally, or the proceedings be subject to a restraining order. There is no more reason for holding an assessment unauthorized in one case than in the other. To claim that the proceedings are void because lands are not assessed for benefits which it is impossible legally to assess is not a tenable proposition as a matter of law. In cases like the one under consideration, we do not think the principle of wilful omission from assessment should have any application. If it were to be enforced in cases like the present, it would result in defeating beneficial drainage projects and make the securing of outlets outside of drainage districts impossible.

For these reasons the order is reversed, and the cause remanded to the District Court for further proceedings.

SPALDING and CARMODY, JJ., dissenting.

SPALDING, J. (dissenting). I regret my inability to concur in the above opinion. I have no doubt the construction of the proposed drain would be of great benefit to the lands affected, but that fact furnishes no warrant for its construction under the present proceedings and law, unless such proceedings are in conformity with the law, and the law is applicable to the situation. It seems that the atmosphere surrounding the question is tainted with the impression that the law must provide a means of draining all lands needing drainage, and that it must be so construed as to apply to all possible contingencies arising, in the efforts made to furnish relief to the owners of such land. The remedy for its failure to make provision for all contingencies lies with the legislature, and not with the courts. I shall briefly state my reasons for concluding that the drainage law is not applicable to this case, but if it is the proceedings are not in conformity with the law.

1. The petition in this case, as applied to Bottineau county, which is the county bordering on the International boundary, requests that the drain "commence at the south side of Bottineau county, in the center of the Mouse river channel, and dredge the river north to the International Boundary Line, thus reclaiming the low land adjoining the river on each side." It will thus be seen that the petition established the starting point and terminus of the proposed drain at the south and north lines of Bottineau county respectively. Section 1821, Rev. Codes 1905, as amended by chapter 93, Laws of 1907, as far as relates to this subject, reads: "A petition for the construction of a drain may be made in writing to the board of drain commissioners, which petition shall designate the starting point and terminus and general course of the proposed drain." Authority is given to the drainage commissioners, under the advice of the surveyors, to vary from the line described in the petition, but no authority is given to vary the source and terminus of the drain. I would not contend that a slight variation would invalidate the proceedings, but the question involved in this case is not any immaterial variation, but it is as radical as though the drain were located by the commissioners 14 miles west of the Mouse river. The mouth of the drain proposed to be established is approximately 14 miles north of the International Boundary Line. The total cost is estimated at about \$142,000. Of this it is estimated that \$70,000 must be expended north of the International Boundary Line.

2. The statute, I think, requires title to the right of way to be obtained, unless it is in the state or other superior authority. The title to the right of way north of the boundary line has not been obtained, and is in a foreign municipality or owners over whom neither the drainage nor county commissioners nor the courts of this state have any jurisdiction, and this seems to me to render the proceedings regarding the 14 miles in foreign territory invalid. Sec. 1823, Rev. Codes 1905, as amended 1907.

3. Section 1842, Rev. Codes 1905, as amended in 1907, requires that the drain, when completed, shall be under the charge and control of the county commissioners. The contract entered into with the municipal authorities of Arthur provides that that part of the drain located therein, it being about 14 miles, and on which the successful

operation of the whole project depends, shall be controlled by the municipal authorities of Arthur, but maintained by the commissioners, and this contract is in accordance with a by-law adopted by that municipality, in which it is provided that, when completed, the drain shall be controlled by that municipality, although the entire cost of the construction and maintenance thereof is to be borne by the owners of the land assessed in McHenry and Bottineau counties, North Dakota. I am of the opinion that this provision in the contract, under which alone it is proposed to construct the drain north of the International Boundary Line, is in direct conflict with the provisions of the Code cited.

4. The learned trial judge held that the fact that the lands in the Municipality of Arthur were to be benefited, and not assessed, was a controlling ground for holding the proceeding invalid. The by-law adopted by that municipality describes the lands which are to be benefited therein by the drain, and which are not to share in the burdens. I would not contend that the fact that a small acreage was incidentally benefited would invalidate the proceeding, but here the amount is so great that it seems to me violative of the principles underlying the power to impose special assessments. They can only be imposed by reason of the property assessed being benefited by the improvement, and it is elementary that to render such assessments valid the assessments must be apportioned on all the property benefited in proportion to the respective benefits. Several thousand acres in the Municipality of Arthur entirely escape any share of the burdens, yet are shown to reap special benefits. The fact that such lands lie outside of the jurisdiction is the misfortune of the advocates of the establishment of the drain, and a misfortune which, under the existing statute, I see no legitimate way of providing against. Should their money be expended in the construction of the drain, and thereafter the Municipality of Arthur, for any reason, determine to exercise the control given it by the contract over the 14 miles in Canadian territory, or to exclude the commissioners from keeping it in repair, as it might do at any time should a disagreement arise, the contributors might find themselves in far worse position than now. In the majority opinion reference is made to authorities where lands were wilfully, arbitrarily, or intentionally omitted in making the assessments, and a distinction is drawn

between those cases and the present, to show that the rule does not apply in this case; but it occurs to me that the issue is the fact of omission rather than the purpose of the commissioners in making the omission. In the case at bar it is conceded that the omission was intentional, but it claimed that the fact that the lands omitted are outside the jurisdiction does away with the rule. I may, however, add that because of these lands lying outside of the jurisdiction, I am not as strongly convinced that this point is fatal as I am of those which I have before briefly referred to.

The authorities hold that laws of this nature must be strictly complied with and its terms strictly construed by the courts. This ought especially be true with reference to drainage laws, and particularly with reference to the drainage laws of this state by which almost unlimited powers are given to a board of drainage commissioners on the petition of only six property owners, who may be a very small minority of those required to bear the burdens. The law is subject to great abuse, and by many it is insisted that it is being very widely abused, and many owners of real property required to pay assessments altogether out of proportion to the benefits derived. This may not be a question for the the courts to consider, but, if true, it furnishes a reason for requiring the terms of the statute to be strictly followed. I call attention to *Hundley v. Lincoln Park*, 67 Ill. 559, as a case which appears to me directly in point, and where the court held, on the establishment of Lincoln Park, in Chicago, that because money derived from assessments in one town was to be expended in another town, the proceedings were rendered invalid. I think the judgment should be affirmed, and am authorized to say that Judge Carmody concurs herein except to paragraph 1.

#### On Rehearing.

PER CURIAM. Former opinion adhered to.

SPALDING, J. (dissenting). A reargument was had in this case. Both the majority and minority of the court adhere to their original opinions. Some minor changes which have been made in the majority opinion, and some suggestions on the reargument, make a few additional words of dissent proper.

In my judgment much more serious questions are involved in this case than any considered in the majority opinion. This is not a case where one municipality is contracting with or constructing works in another municipality in the same state, where the same laws are applicable to all, and where the same legislative body can regulate the power of each municipality, nor is it a case where one state desires to extend municipal work within the limits of another state; but it embraces the proposition of a minor municipality of a subdivision of one nation extending its works of internal improvement within the limits of a foreign, sovereign power, whose laws are not before us, whose legislative action is not shown to have been framed with any reference to such works, whose courts are not construing our law, and who cannot be presumed to take into consideration what improvement is necessary for the promotion of the welfare of the landowners in this state. It is also a question whether the treaty rights of the Federal government are not invaded.

All these suggestions would form a fruitful basis for discussion if it were necessary to pass upon them; but for the reasons given in my former dissent, and for lack of time demanded by other duties they are passed without discussion.

The majority opinion has been somewhat revised with reference to a distinction which appears to be drawn between a drain wholly artificial and one made by deepening and widening the channel of an actual stream. While as a matter of fact there is a distinction between these works, yet, in contemplation of our drainage law, there appears to me to be no distinction whatever. One is made the basis for the assessment of private property, the same as the other, and this is the principal and governing element in the matter. The stream, whether widened and deepened, or only cleared out so as to permit the free passage of surface water, is a drain within the meaning of our drainage law; and all the provisions of that law applicable to assessment, to obtaining the title to the right of way, and other matters, are equally applicable to the natural stream as to the wholly artificial drain. It seems to me that this proceeding is fraught with great danger to the people whose property is being assessed to pay for this so-called improvement. As far as disclosed by the record, the right of way has not been obtained from all the property owners on the North side of the Canada boundary, and certainly, as to those from



whom it has not been obtained, all persons approaching the stream for the purpose of widening or deepening it will be trespassers; and I know of no method by which the right of eminent domain can be exercised by a municipality of this state in a foreign country, and the right of way secured thereby. This, to me, appears to be a question of vital importance, and, alone, fatal to the contention of the appellant.

For these reasons, and many others which might be expressed did time permit, I adhere to my original dissent.

CARMODY, J. I concur in the foregoing dissent.

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RANDE NORDHAGEN v. ENDERLIN INVESTMENT COMPANY and John J. Lee, Sheriff of Ward County.

(129 N. W. 1024.)

**Evidence — Warrants — Decree Quietling Title.**

Evidence examined, and under the law of Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390, it is held that appellant is entitled to a decree quieting title to the land described in the opinion, against all claims of respondent.

Opinion filed January 24, 1910.

Appeal from District Court, Ward county; *Goss, J.*

Action to quiet title.

Reversed.

*Pierce, Tenneson & Cupler*, for appellant.

No appearance or brief for respondent.

SPALDING, J. This appeal was taken by the defendant, the Enderlin Investment Company, from a judgment of the district court of Ward county, adjudging that the plaintiff, Rande Nordhagen, was the owner in fee simple and entitled to the possession of the southwest quarter of section 35, in township 155, north of range 81, west, and quieting title in her, and canceling a deed given by Gilbert Nordhagen to Carl Nordhagen, and recorded in the office of the register of deeds of

Ward county, North Dakota, in Book 6 of Deeds at page 457, on the 27th day of April, 1905, and one given from Carl Nordhagen to Rande Nordhagen, and recorded in Book 9 of Deeds, in the same county, page 44. The facts relating to this proceeding are sufficiently set forth in the opinion of this court found in *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390. The case cited was an action brought by the Enderlin Investment Company, under the forcible entry and detainer statute, on the ground that the defendants had wrongfully held over after the title had ripened in the Enderlin Investment Company through a sheriff's deed issued on an execution sale. While that action was pending, Rande Nordhagen brought this action to quiet title to the same land. That action was tried by the court without a jury, and it was stipulated that the evidence offered in the forcible entry and detainer action should be considered as having been offered and introduced in this action, and that the same findings and conclusions should be made by the district court in this action that should be made in such other action. The defendant in the case at bar pleaded a counterclaim based upon the title claimed through the sheriff's deed. No question was raised as to the regularity of the proceedings leading up to and including the execution and delivery of the sheriff's deed. The forcible entry and detainer action resulted in a judgment for defendant, Rande Nordhagen, in the trial court, which was reversed by this court, and the judgment quieting title in her in the case at bar resulted from the stipulation. All the evidence offered in the other action was received, and we have examined the same carefully to ascertain whether it necessitates a reversal of the judgment entered in this action. We find the facts clearly established the right of the defendant and appellant herein to a judgment quieting title in it as against the plaintiff and respondent, Rande Nordhagen, to the land in question, under the law as construed in the opinion in *Enderlin Invest. Co. v. Nordhagen*, *supra*.

The judgment of the District Court is reversed, and that court is directed to enter judgment quieting title to the land described in the appellant.

All concur, except Goss, J., disqualified, and MORGAN, Ch. J., not participating. By request W. C. CRAWFORD, judge of the tenth judicial district, sat in the place of Goss, J., disqualified.

STATE OF NORTH DAKOTA EX REL. F. C. HEFFRON, Assistant Attorney General, v. JOSEPH BLETH and Leonard Bleth.

(127 N. W. 1043.)

**Appeal and Error — Notice of Appeal — Appeal from an Order and from the Whole Thereof.**

1. A notice of appeal to this court is sufficient where it states that the appeal is from an order, fully describing it, although it does not expressly state that the appeal is from the whole of the order, in accordance with the provisions of the statute.

**Appeal and Error — Dismissal of Appeal — Failure to Enumerate Papers.**

2. A failure to follow the provisions of § 7325, Rev. Codes 1905, by enumerating in an order made, all the papers on which it is based, does not necessarily authorize a dismissal of an appeal from such order.

**Appeal and Error — Acceptance of Benefits.**

3. Payment of costs to the clerk, pursuant to an order of court, without proof of the acceptance thereof by the appellant, is not ground for the dismissal of the appeal.

**Intoxicating Liquors — Nuisance — Abatement — Order without Notice.**

4. An order of court is not made without notice when it is expressly based on the terms and conditions of a former order, stating that when certain conditions have been complied with another order will be made without further notice.

**Intoxicating Liquors — Abatement of Nuisance — Leasehold Premises — Return to Owner — Discretion.**

5. Whether a building in which a tenant of the owner has maintained a nuisance by keeping and selling intoxicating liquors therein, of which the owner had knowledge prior to the commencement of an action to abate the nuisance, shall be turned over to the owner after it has been closed by proceedings under § 9373, R. C. 1905, is discretionary with the trial court, and such discretion will not be disturbed except in cases of the abuse thereof.

**Intoxicating Liquors — Abatement of Nuisance — Return of Premises to Owner — Good Faith of Owner.**

6. If the owner complies with § 9373, supra, and the trial court is satisfied

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Note.—Knowledge necessary to charge owner with conduct of tenants or others in selling intoxicating liquor on premises in violation of injunction, see note in 25 L.R.A. (N.S.) 602.

Liability of property owners for illegal sales generally upon their leased premises, see note in 12 Am. St. Rep. 354.

of his good faith in intending to abate the nuisance, the mere fact that he was aware of the maintenance of the nuisance, by his tenant, before the abatement proceedings commenced does not necessarily deprive the owner of the benefits of said section.

Opinion filed September 23, 1910.

Appeal from the District Court of Stark county; *Crawford, J.*

Action to abate a nuisance. Petition of defendant for the abatement of the action on compliance with § 9373, Rev. Codes 1905, granted. The State appeals.

Affirmed.

*Andrew Miller*, Attorney General, *Alfred Zuger*, *C. L. Young*, and *F. C. Heffron*, Assistant Attorneys General, for the State.

Owner of a leased building used as nuisance under the prohibition law is a proper party defendant in a proceeding in equity to abate it. *Martin v. Blattner*, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; *Drake v. Kingsbaker*, 72 Iowa, 441, 34 N. W. 199; *State v. Douglass*, 75 Iowa, 432, 39 N. W. 686; *State v. Grim*, 85 Iowa, 415, 52 N. W. 351.

*McFarlane & Murtha*, for respondent.

Appellant, by payment of the costs, accepted the fruits of the order, and cannot appeal. *Tuttle v. Tuttle*, 19 N. D. —, 124 N. W. 429.

MORGAN, Ch. J. This is an action to abate a nuisance created by keeping and selling intoxicating liquors in a building in the village of Richardton, Stark county. In the complaint the defendant Leonard Bleth is charged with owning and having control of the lot on which the nuisance is alleged to have been maintained, and is charged with having allowed and permitted the maintenance of such nuisance. The defendant Leonard Bleth admits that he is the owner of the lot, but denies that any nuisance was maintained thereon with his knowledge or consent, and he denies that he permitted or allowed the same to be maintained.

When the action was commenced a preliminary restraining order was issued against both defendants, enjoining them from a continuance of the nuisance. After the service of such restraining order, the defendant Leonard Bleth secured an order to show cause why he should not

be permitted to give a bond, and have the building opened, and the premises turned over to him, and the action abated pursuant to the provisions of § 9373, Rev. Codes 1905. This order to show cause was based upon the affidavit of Leonard Bleth, wherein the facts set forth in his answer were alleged as grounds for the granting of his petition. He further stated therein that the premises in question were leased by him to Joseph Bleth on or about March 20th, 1909, for use as a pool room, and for the sale of cigars and soft drinks, and for no other purpose. After the service of the restraining order, the defendant Leonard Bleth canceled the lease to Joseph Bleth. In the affidavit it is further stated that it is defendant's intention to occupy the building in question in carrying on a dry-goods business, and the value of the premises is stated to be \$1,000.

On the hearing of the order to show cause, the state produced affidavits of two citizens of Richardton, stating that they are well acquainted with the premises, and that it was commonly known in Richardton that this building was used as a place wherein intoxicating liquors were sold as a beverage for several years past, and that said lot and building were apparently under the control of and owned by the above-named defendants since January 1, 1909. On information and belief it is further stated in the affidavits that this building was used since that date as a place where intoxicating liquors were kept and sold.

After hearing the proofs of both parties, the court made an order, on September 7, 1909, that Leonard Bleth be allowed to pay the costs and attorney's fees, amounting to \$89.60, and to give a bond in the sum of \$1,000, conditioned that said Leonard Bleth immediately abate the nuisance complained of, and that he prevent any nuisance upon said premises for one year, and that upon the payment of said costs to the clerk and the filing of the bond, the court would, without further notice, make an order opening the building and surrendering same to the said Leonard Bleth, and abating the action. The bond having been filed and the costs and attorney's fees paid in to the clerk's office, the trial court made an order on September 13th that the premises be turned over to the defendant Leonard Bleth, and that the action be abated. The state excepted to the making of the order, and has appealed from the same.

Certain preliminary questions of practice are raised by the respondent, which we will dispose of before considering the merits.

1. It is claimed that the notice of appeal is not in compliance with the statute, and that the appeal should be dismissed on account of such defective notice. The defendant claims that it does not specify whether the appeal is from the whole of the order or from a part thereof. The notice states that "the plaintiff appeals to the supreme court of the state of North Dakota from the order made and entered in the above-entitled action on the 13th day of September, 1909." The provisions of the order are further stated in the notice. The statute provides that an appeal must be taken by serving a notice upon the adverse party and filing the same in the office of the clerk of the court in which the order appealed from is entered, "stating the appeal from the same, and whether the appeal is from the whole or a part thereof, and, if from a part only, specifying the part appealed from." Rev. Codes 1905, § 7205.

We think that the notice complies with the statute. The objection urged that the notice does not in express words state whether the appeal is from the whole of the order or from a part thereof is technical, and not substantial. We think the notice substantially complies with the statute in this regard. An appeal from an order is necessarily from the whole. Nothing would be added to the effect of the notice by stating that the appeal is from the whole of the order. The same objection was before the court in *Irvin v. Smith*, 68 Wis. 220, 31 N. W. 909, and held of no force, under a statute which is like our own.

2. The order appealed from fails to state what affidavits, papers, or evidence it is based on, and was therefore not drawn in compliance with the provisions of § 7329, Rev. Codes 1905, requiring such statement. This omission is urged upon us as a ground for dismissing the appeal.

Under the terms of this section it is made expressly discretionary whether the supreme court shall dismiss an appeal when based upon this ground. In view of the fact that there is no doubt as to what papers were used on the application, from an inspection of the record, and in view of the fact that the order was made on the defendant's motion, we see no reason for dismissing the appeal in this case, al-

though we deem it important, ordinarily, that the statute be carefully complied with.

3. It is also urged that the appeal should be dismissed on the ground that the appellant has accepted the costs and attorney's fees paid by the defendant as a condition precedent to the granting of the order of abatement. The claim is that the appellant should not be allowed to appeal from the order after having accepted the terms imposed thereby. The record does not show a payment to or acceptance of the money by the state. The original order directed the payment of the costs and attorney's fees to the clerk. There is nothing in the record showing an acceptance of them by the plaintiff. This makes it unnecessary to further notice the point, as payment to the clerk of the court is not payment to the plaintiff in this case, or to plaintiff's attorneys.

4. It is also claimed that the order is not appealable, for the alleged reason that it was made without notice. We do not think that this contention can be upheld. It appears that the order appealed from is based on the order of September 7th. That order was made after notice, and the parties appeared and presented evidence in the form of affidavits. There was a determination of every question at the hearing, but the final order was not made, inasmuch as the costs had not been paid nor had the bond been filed. The court therefore ordered that, upon compliance with these conditions, an order of abatement of the action and a surrender of the premises to the defendant would be made without further notice. The notice of appeal states that the order appealed from is based on the order of September 7th. Strictly speaking, the order appealed from was therefore made on notice, and after argument and hearing.

The merits present an important question, not free from difficulty, on which no cases directly in point have been cited or can be found. It involves the construction of § 9373, Rev. Codes 1905, pertaining to the abatement of nuisances, and the turning over of the premises to the owner under certain conditions, where nuisances have been maintained thereon by a tenant of the owner. So far as material on this appeal, that section reads as follows: "And said officer abating such nuisance shall securely close said building, erection, or place where such nuisance was located, as against the use or occupation of the same for saloon purposes, and keep the same securely closed for

the period of one year, unless sooner released as hereinafter provided, and any person breaking open said building, erection, or place, or using the premises so ordered to be closed, shall be punished for contempt, as hereinafter provided in case of violation of injunctions; provided, however, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof in writing to the tenant, and when this is done the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisance shall not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant. If the owner appears and pays all costs of the proceedings, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or, in vacation, the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding is an action in equity, and bond is given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; provided, however, that the release of the property under the provisions of this section shall not release it from any judgment, lien, or penalty, or liability to which it may be subject under any other statute or law."

The state claims that the respondent, as owner of the building, is not entitled to the benefit of this section, for the reason that he had knowledge that the nuisance was being maintained on his lot, and in consequence thereof, that he consented to the maintenance of the same by not taking steps to have the same abated.

This court held, in *State ex rel. McClory v. Donovan*, 10 N. D. 610, 88 N. W. 717, that where the owner of a lot maintains a nuisance thereon himself, he is not entitled to the benefits of this section, which applies only to leasehold premises. That construction was proper under the express language of the section. In this case the nuisance was established and maintained by the tenant without any actual partici-



pation therein by the owner. Conceding that it was maintained with his knowledge and implied consent, was it the legislative intent that the owner should not be given the possession of his property on condition that the nuisance be abated and all costs paid? So far as the enforcement of the law is concerned, everything is accomplished by such abatement that can be accomplished by continuing the action to final judgment. That is, the nuisance is actually abated, and security given that none will be established thereon for one year. Does the fact that the owner was aware that his tenant was using the premises in maintaining a nuisance thereon necessarily place him in the same position, so far as this statute is concerned, as though he actually maintained the nuisance himself? We do not think the language of the section warrants any such construction. The language is general, and without any words to indicate that the owner is not entitled, as a matter of law, to have the premises surrendered to him, although he had knowledge of the illicit manner in which the property was being used. If such was the intent of the law-makers, it could easily have been expressed. To so construe the statute would, in our judgment, be going beyond its language, and would be reading an exception into it.

Before the court should permit the property to be surrendered to the owner, however, it must be satisfied of the good faith of the owner. This means his good faith so far as abating the nuisance in the future is concerned. In determining this question of good faith, his past conduct in respect to the maintenance of the nuisance will be a proper matter for consideration. The good faith of the owner, however, is his good faith towards the permanent suppression of the nuisance in the future. Although he may have had some knowledge of the maintenance of the nuisance in the past, and did not, as promptly as he should have done, take measures to suppress the same, that fact does not necessarily debar him from the benefits of this section, if he can convince the court of his good intentions as to the future. We think that much was intended to be left to the discretion of the trial judge by this section. There is no positive evidence in this case that this defendant was aware of the fact that a nuisance was being maintained on his lot. Therefore there is no evidence that he actually consented to the maintenance of the nuisance. The trial court found that the de-

fendant was aware of the nuisance upon this lot before the action was commenced, or had reason to believe the same. Upon this finding we do not think that a fair construction of said § 9373 defeats the right of this defendant to invoke the provision of that section.

The supreme court of Iowa, under a statute almost identical with § 9373, *supra*, except that it applies to owners generally, and not especially to the owners of leased premises, has held that the owner is entitled to the benefits of that section, and no distinction seems to have been drawn between owners that were guilty of maintaining the nuisance and those not guilty. (*Morris v. Lowry*, 113 Iowa, 544, 85 N. W. 788; *Morris v. Connolly*, 113 Iowa, 545, 85 N. W. 789.)

It follows that the order appealed from should be affirmed, and it is so ordered. All concur, SPALDING, J., concurring specially.

SPALDING, J., concurring. I concur in the court's finding that there is no evidence that respondent actually consented to the maintenance of the nuisance in question, and therefore concur in the affirmance of the order appealed from. In view of this finding, it is unnecessary to express an opinion as to the law which might be applicable in case the respondent had known of the maintenance of the nuisance or had become *particeps criminis* by renting his premises for the purpose of maintaining a nuisance.

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## JAMES A. WELLS v. CITY OF LISBON.

(128 N. W. 308.)

### Municipal Corporations — Excavations in Streets — Protection of Travelers — Care Required.

1. In prosecuting works requiring excavation in the traveled street of a city, a municipal corporation is bound to do so with due regard to the rights

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Note. — The question of liability of a municipal corporation for injury from defects or obstructions in streets is considered in a note in 20 L.R.A.(N.S.) 513, in which all questions as to the duty of municipalities to keep streets in safe condition, the degree of care required, the precautions to be taken in case of excavations,

of travelers in the vicinity of the excavation, and must use such precautions as are reasonably necessary for the protection of such travelers.

**Municipal Corporations — Repair of Streets — Ordinary Care — Degree Dependent on Circumstances.**

2. The degree of care required of a municipality in such case is ordinary care, and what constitutes ordinary care depends upon the circumstances of the particular case, and must depend largely upon atmospheric and other conditions.

**Municipal Corporations — Excavations in Streets — Degree of Care — Atmospheric Conditions.**

3. Greater care is required in such case on the part of a municipality in a snowy, dark, or stormy night, than in a clear, moonlight night.

**Municipal Corporations — Excavations in Streets — Negligence of City — Question for Jury.**

4. The evidence in this case being conflicting as to the precautions which the appellant took on a stormy night to protect travelers from injury by reason of an excavation in a traveled street in the city, it is *held*, that the question of defendant's negligence was properly submitted to the jury.

**Municipal Corporations — Repair of Streets — Degree of Care Required of Traveler — Atmospheric Conditions.**

5. The care required of a traveler in a street of a city where excavations or other obstructions exist is such as persons of common and reasonable prudence ordinarily exercise under like circumstances, and must be proportionate to the increased danger from darkness or other atmospheric conditions.

**Municipal Corporations — Obstruction of Streets — Contributory Negligence — Question for Jury.**

6. When defendant's dray approached an excavation in appellant's street between 6 and 6:30 P. M. on the 2d day of January, only one light was burning to warn travelers of danger from such excavation. That light was placed in the middle of the street, where there was no excavation, but where the street had been obstructed by a plank 18 inches above the surface on which this light was hung, such plank covering the only safe part of the street, and the driver, being unable to see where the excavation was, assuming that the light marked the place of excavation, turned away from the light, and his team, floundering in a snow drift, fell into the excavation and was killed. The question of the contributory negligence of the driver was one for the jury, under these facts and the surrounding circumstances.

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etc., are considered and the authorities reviewed. The question of necessity and sufficiency of notice of claim or cause of injury is also considered in this note (pages 757 et seq.).

The question of contributory negligence of person injured on defective street is treated in notes in 21 L.R.A.(N.S.) 614, and 47 Am. Rep. 744.

**Municipal Corporations — Obstructed Street — Injury to Travelers — Evidence.**

7. The driver of plaintiff's team was permitted to testify as to the manner in which he had seen similar excavations in the same city protected, as one reason for supposing the light marked the excavation. *Held*, that the admission of such testimony was not prejudicial, but was competent to aid the jury in determining the degree of care exercised by the driver, if limited, as it was in this case, to that purpose when offered.

**Municipal Corporations — Trial — Injury to Travelers — Instructions.**

8. Objections to certain instructions to the jury held without merit.

**Municipal Corporations — Obstructed Streets — Injury to Traveler — Notice of Claim — Sufficiency.**

9. Plaintiff filed a notice of claim with the city auditor in an attempt to comply with the provisions of §§ 2703 and 2704, R. C. 1905. Plaintiff assigned error because two papers, each verified by the claimant, were not filed, instead of one. *Held*, that inasmuch as the one notice filed contained all the information required by both sections, it was a sufficient compliance with the statute, and that it is a matter of indifference whether the whole information required to be given the city council is contained in one paper or two, if sufficient in substance to serve the purpose intended.

Opinion filed October 10, 1910.

Appeal from the District Court of Ransom county; *Allen, J.*

Action for loss of a pair of mules in an excavation in the street of the defendant and appellant. Verdict and judgment for plaintiff and respondent.

Affirmed.

*Sidney E. Adams*, for appellant.

City need only place a light that will warn reasonably prudent people of danger. *Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 64; *Slaughter v. Huntington*, 64 W. Va. 237, 16 L.R.A.(N.S.) 459, 61 S. E. 155; *Garnetz v. Carroll*, 136 Iowa, 569, 114 N. W. 57.

Due care is presumed. *Swift & Co. v. Holoubek*, 60 Neb. 784, 84 N. W. 253; *O'Connor v. Connecticut R. & Lighting Co.* 82 Conn. 170, 72 Atl. 934.

Where plaintiff's proof shows his contributory negligence, directed verdict is proper. *Prideaux v. Mineral Point*, 43 Wis. 524, 28 Am. Rep. 558; *Hoth v. Peters*, 55 Wis. 405, 13 N. W. 219; *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5; 29 Cyc. Law & Proc. p.

630 (B) and cases cited; 27 Cyc. Law & Proc. p. 605 (III); Gleason v. Suskin, 110 Md. 137, 72 Atl. 1034.

*Chas. S. Ego*, for respondent.

City must protect its streets in a reasonably prudent manner. *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113; *Colorado Mortg. & Invest. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42.

Where evidence of negligence is controverted, finding of jury is decisive. *Finney v. Northern P. R. Co.* 3 Dak. 270, 16 N. W. 500; *Franz Falk Brewing Co. v. Mielenz Bros.* 5 Dak. 136, 37 N. W. 728; *Studebaker Bros. Mfg. Co. v. Zollars*, 12 S. D. 296, 81 N. W. 292; *Drinkall v. Movius State Bank*, 11 N. D. 10, 57 L.R.A. 346, 95 Am. St. Rep. 693, 88 N. W. 724; *Flath v. Casselman*, 10 N. D. 420, 87 N. W. 988; *Taylor v. Jones*, 3 N. D. 235, 55 N. W. 593; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414; *Bishop v. Chicago, M. & St. P. R. Co.* 4 N. D. 536, 62 N. W. 605. Lights must be secured as well as placed. *Schumacher v. New York*, 166 N. Y. 103, 59 N. E. 773.

Refusing a directed verdict was not error. *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912; *Wakeham v. St. Clair Twp.* 91 Mich. 15, 51 N. W. 696; *Fletcher v. Ellsworth*, 53 Kan. 751, 37 Pac. 115.

If notice to city states facts clearly and substantially it is sufficient. *Dubois County v. Wertz*, 112 Ind. 268, 13 N. E. 874; *Howard County v. Jennings*, 104 Ind. 108, 3 N. E. 619; *Powers v. St. Paul*, 36 Minn. 57, 30 N. W. 433; *Shepard v. Easterling*, 61 Neb. 882, 86 N. W. 941; *LaFlamme v. Albany*, 158 N. Y. 699, 53 N. E. 1127; *Young v. Douglas*, 157 Mass. 383, 32 N. E. 354.

Defects were waived. *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011; *Griswold v. Ludington*, 116 Mich. 401, 74 N. W. 663; *Wright v. Portland*, 118 Mich. 23, 76 N. W. 141; *Wheeler v. Detroit*, 127 Mich. 329, 86 N. W. 822; *Rusch v. Dubuque*, 116 Iowa, 402, 90 N. W. 81; *Werner v. Rochester*, 149 N. Y. 563, 44 N. E. 300.

If notice was defective, notice of its rejection on that ground should have been given. *Abbott, Mun. Corp.* §§ 484-1061; *Connor v. Salt Lake City*, 28 Utah, 248, 78 Pac. 479; *Chamberlain v. Saginaw*, 135 Mich. 61, 97 N. W. 156.

SPALDING, J. The defendant, the city of Lisbon, is a municipal corporation. The plaintiff on the 2d day of January, 1907, was the owner of a dray and a pair of mules, and one Laren was employed as the driver thereof in the business of draying. The city of Lisbon was engaged on that day in laying water mains on certain streets, particularly near the south side of Sixth street where it crosses Elm street, Sixth street running east and west and Elm street north and south. A ditch had been excavated along Sixth street for the purpose named, about 8 feet deep, and it extended from both the east and west into Elm street, leaving a space from 14 to 18 feet wide in the center of Elm street unexcavated. The evening of January 2d was very stormy and the wind blew with considerable force, drifting the snow. Workmen had been engaged for some time on this excavation, and on that evening ceased work about 5:30 o'clock, when a plank was placed across the intact portion of Elm street, one end resting upon a pile of dirt and the other upon some cans about 30 inches above the surface of the roadbed, and a lighted lantern was suspended from the center of the plank. Testimony was submitted showing that other lights were placed in different localities in the vicinity of the excavations, but there is no evidence that at the time of the accident any light was visible except the one in the center of Elm street. Testimony was also received that thirty minutes after the lights are claimed to have been placed, there were no lights or barricades on either of the ditches. Other witnesses testified that they saw several lights shortly after the time a workman testified to placing them. About 6:15 or 6:30 that evening, Laren drove toward this spot with plaintiff's mules and dray. He testifies that he saw the one light in the center of the street when about 40 feet from it; that the mules were walking; that he could see no pile of dirt ahead; that he pulled the mules up and turned to the left, between the end of the ditch and the curb, on the assumption that the ditch or obstruction was where the light was placed, and that, as far as he could see, there was an unobstructed passage to the side of the light. The

snow was drifted so as to conceal the pile of dirt which had been thrown from the excavation, and his mules floundered as they reached the drift, and fell into the ditch, and received injuries, which resulted in their death. This action is brought to recover the value of the mules. The answer admits that the mules were killed by falling into the ditch, denies that the streets were dangerous, unsafe, or defective, and that the city failed to place warning signals at or near the excavation, and alleges that it used due care and diligence in guarding the same with lanterns and barricades, and alleges that the injury complained of was caused solely by the negligence and want of ordinary care on the part of Laren, the driver, and that the ditch was guarded by lights to warn teamsters and other persons using said streets of the existence of the obstacles; that Laren was aware of such warning signals, and notwithstanding the same, and without making any examination of the highway on which he was driving, started to drive around said lights and barricade, and in so doing, in the dark and in the storm, drove into the snow bank, in which his mules floundered, causing them to fall into the ditch, whereby they were injured as alleged.

The jury returned a verdict in favor of the plaintiff, assessing his damages at \$450, upon which judgment was duly entered. The case is here on appeal from the judgment and from an order denying appellant's motion for judgment *non obstante* or for a new trial.

The errors assigned relate to the orders denying defendant's motion for a directed verdict at the close of plaintiff's case in chief, its motion for a directed verdict at the close of the whole case, to the admission of certain evidence, and to certain instructions of the court. We shall consider them separately.

1. In prosecuting works of the nature described in this complaint, a municipal corporation is bound to do so with due regard to the rights of travelers on the street in the vicinity of the excavation, and it must use such precautions as are reasonably necessary for the protection of such travelers. The degree of care required of the municipality is ordinary care, and what constitutes ordinary care depends upon the circumstances of the particular case. Elliott, Roads & Streets, § 472, and authorities cited. The degree of care requisite may depend largely upon the atmospheric and other conditions, greater care being required

to constitute ordinary care in a snowy, dark, or stormy night than in a clear, moonlight night.

In the case at bar there is no evidence that more than one lantern was present in the vicinity of the excavation at the time of the accident, and this within an hour after the workmen ceased their labors and placed the light or lights. The testimony as to the placing of other lights is indefinite as to where located, or how they were protected, or to what extent they warned travelers. If, as a fact, several lights were placed, the failure in less than an hour of all but one was evidenced, from which the jury might conclude that they were inadequate or improperly placed to serve the purpose contemplated. The location of one light on the only safe part of the street, hung from a plank 30 inches above ground, could rightly be considered by the jury an act of negligence in itself, and as warning the traveler away from the safe portion of the street, and tending to turn him into the unsafe portion, just as it did in this instance. In short, the nature of the evidence regarding the character of the lights and their location is such that the most that can be said in favor of appellant is that it was sufficient to sustain a verdict of negligence on the part of the city. We need not consider the question of barricades and other methods of warning to protect travelers, because no claim was made on the trial that any precautions were taken by the placing of lanterns, and the action was tried on the theory that lanterns were the only warnings used.

2. Was Laren, the driver, negligent? Like the question of negligence on the part of the municipality, the care required on his part is, in general, such as persons of common and reasonable prudence ordinarily exercise under like circumstances, and must be proportionate to the increased danger from darkness and other atmospheric conditions. Elliott, Roads & Streets, §§ 635 to 637; Overson v. Grafton, 5 N. D. 281, 65 N. W. 676; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; 15 Am. & Eng. Enc. Law, p. 472.

There is a conflict in the evidence as to the driver knowing that the ditch was ahead. We think, under the circumstances of this case, the question of the driver's negligence was a question for the jury, at least there is sufficient evidence of care on his part to sustain the verdict. The jury was in a better position to judge of the care required of an ordinarily prudent person, under the conditions existing on that night



in that place, than the court can be. Whether such a person would, under the circumstances, have turned to one side on discovering the light and noting its location, on the assumption, as did the driver, that the light marked the obstruction, is not sufficiently clear so the minds of reasonable and fair men would be likely to reach the same conclusion. *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, and authorities cited. Defendant relies upon *Smith v. Jackson*, 106 Mich. 136, 63 N. W. 982, as his strongest authority, and says that it is directly in point except that in that case the team was slowly trotting instead of walking. We do not so read it. On the contrary we read it as tending to support respondent's case. In that case the driver saw the light 4 or 5 rods distance, and his horse continued at a trot until he reached the vicinity of the light, when he turned to the right to shun the light, and his horse fell into the trench. He did not turn far enough nor soon enough, and the light was located on the obstruction. He took no precaution except to avoid driving over the light. *Crowther v. Yonkers*, 39 N. Y. S. R. 748, 15 N. Y. Supp. 588, is much more nearly in point. In that case a sewer trench made in the street was left unprotected and without lights except at the head of the trench, a distance of 70 feet. Plaintiff fell into the trench and was injured, and the court held that the question of contributory negligence was properly submitted to the jury, and that it was gross negligence for the city to allow a sewer excavation to remain unprotected and without lights except at the head of the excavation. In the case at bar the one light found was at the head of the two excavations and not on either of them. In *Wood v. Bridgeport*, 143 Pa. 167, 22 Atl. 752, the plaintiff testified that the light was on the right-hand side of the road; he attempted to drive by on the left side of the road. Defendant's witnesses claimed that the lights were equally distributed across the street. There was evidence that the occupants of the carriage were warned by a person on the street that they could not cross, and it was held that the questions of negligence and contributory negligence were for the jury, and that as to the driver stopping and looking and finding out what was meant by the lights, the test was whether he acted as a man of ordinary care and prudence would have acted under similar circumstances.

Authorities might be multiplied sustaining our conclusions, which

are that as to the motions, unless evidence was improperly received, to which we refer later, the court did not err in denying them.

3. The second class of assignments relates to the admission of evidence regarding some of Laren's reasons for supposing the ditch where the light appeared. In brief, this testimony was to the effect that he had seen other ditches on public work in that city, protected by lights placed on planks in front of the excavations, and the center of the street left open for travel. Even if the admission of this testimony constituted error, we are not clear that it was prejudicial, but we think it was admissible to aid in determining the degree of care exercised by the driver. It was limited to this purpose, when offered. The jury was entitled to know the conditions existing and what prompted him to pursue the course which he did pursue. The fact that the city, on other jobs of this kind, had pursued a custom of placing warnings in a certain manner, had some bearing on what he might expect in the instant case. Its weight as evidence might be slight, but its value was for the jury to determine. 8 Enc. Ev. p. 952.

4. Other assignments relate to certain instructions given to the jury. The first error relates to an instruction regarding the place of the lights, the objection being that it ignored the question of their proper location. The language of the court indicated that it was necessary for the jury to find as to whether they were so placed that they would accomplish the purpose of warning anyone of danger. It was not the province of the court to indicate the exact spots where they should have been placed. We think this a sufficient reference to the location, and that it is, at least, as favorable to the appellant as it should be. Objection is made to the court's reference to the kind of lights, wherein he indicated that they should be such as were ordinarily used for that purpose, and that lanterns would be proper lights, while a tallow candle would not be. We see no objection to his having compared lanterns with a tallow candle, though no candle was in evidence either at the excavation or in the record. Appellant's suggestion that the statement that a candle would not have been a proper light was erroneous, in view of the fact that under some circumstances it might have been, is without merit, and could have had no influence on the jury. Other assignments relating to instructions are on similar lines, —extremely fine spun and without merit.

5. It is urged that the notice of claim filed with the city auditor does not comply with § 2704, Rev. Codes 1905. Appellant contends that under the terms of §§ 2703 and 2704, two papers should have been filed, each verified by the claimant,—one, the claim for which the action is brought, with an abstract of the facts out of which the cause of action arises; the other, a separate abstract of the facts. The notice filed contained the claim and statements required, in one document duly verified. We deem it a matter of indifference whether the whole information required to be given the city council is contained on one paper or two, so it complies with the requirements of the statute in substance and serves the purpose intended.

The orders and judgment of the District Court are affirmed. All concur.

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## J. B. DAVY v. GREAT NORTHERN RAILWAY COMPANY.

(128 N. W. 311.)

### **Negligence — Question for Jury — Master and Servant — Injuries to Servant.**

1. Defendant's passenger station is located at the western edge of the village of Bartlett. There are no buildings or crossings west of the station in the vicinity of said village, but a passing track extends at a distance of a few feet north of the main track, 2,000 feet west of the station. Defendant's railroad had been blockaded for two days, during which no trains had passed Bartlett station. At 8 o'clock in the morning the plaintiff, with others, was sent to do some work at a point 1,600 feet west of the station. On starting he was told by the night operator that no trains were coming, and observed that the block signal was out as a notice to all trains to stop at the station. When 1,400 feet west of the starting point he was struck by a snowplow running as the first section of No. 1, a limited passenger train. The weather was very cold, little wind was blowing, and he, with his companions, wore fur-lined coats, with the collars turned up and their caps pulled over their ears, and did

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Note.—As shown by a review of the cases in a note in 6 L.R.A.(N.S.) 646, the authorities are not entirely agreed as to the measure of care which an employee working on a railroad track must exercise for his own safety, and the question whether or not an employee has been guilty of contributory negligence must necessarily depend, to a great extent, upon the particular circumstances of each case.

not look back while going the 1,400 feet. The bell in the engine was obstructed by snow and ice, and could not be rung, but the whistle could be blown. The jury found that it was not blown, and that no warning was given after passing a crossing several hundred feet east of the station, and it was conceded that no stop was made at the station.

*Held*, that under the circumstances the court could not say, as a matter of law, it was negligence on the part of the engineer not to blow the whistle after passing the station, but that the question of negligence was for the jury.

**Master and Servant—Section Hands—Assumption of Risk—Contributory Negligence.**

2. While, as a general rule, track or section men assume the risks from dangers incident to their occupation, and must protect themselves from approaching trains, especially where not at the time occupied with duties requiring their whole attention, there are exceptions to this rule, and among such exceptions are cases in which circumstances and conditions are extraordinary or exceptional, in which case the question of contributory negligence may be for the jury.

**Master and Servant—Injuries to Servant—Contributory Negligence—Question for Jury.**

3. *Held*, that under the circumstances of this case the court could not say that, in law, the plaintiff was guilty of contributory negligence in not watching for trains when walking on the track a distance of 1,400 feet west from the station at the village of Bartlett, and that it was for the jury.

**Master and Servant—Injuries to Servant—Contributory Negligence—Evidence.**

4. In determining whether the plaintiff was guilty of contributory negligence the jury had a right to take into consideration information which he had received from the night operator and the position of the block signal, as well as other surrounding circumstances.

**Master and Servant—Injuries to Servant—Question for Jury.**

5. The question for the jury in this case was whether an ordinarily prudent person would have been justified in not expecting a train to pass during the time plaintiff was occupied in walking from the station to the place where he was overtaken and injured.

**Master and Servant—Injuries to Servant—Negligence Question for Jury.**

6. The fact that the legislature has required the sounding of a whistle or ringing of a bell at certain places does not relieve the railroad company from giving a signal at other places where none is exacted by statute, provided reasonable care for the safety of its employees or others makes it necessary.

**Evidence—Master and Servant.**

7. Certain minor questions regarding the admission of evidence passed upon.

Opinion Filed October 12, 1910.

Appeal from District Court, Grand Forks county; *Templeton, J.*  
Action by J. P. Davy against Great Northern Railway Company for  
personal injuries.

Plaintiff had judgment. Order denying new trial reversed and new  
trial granted.

*Murphy & Duggan*, for appellant.

Railway employees, such as section hands, must look out for trains,  
and train operators may assume this, and are not bound to keep look-  
out for them, 3 Elliott, Railroads, §§ 1290-1298 A; 4 Thomp. on  
Neg. § 4781; Missouri P. R. Co. v. Moseley, 6 C. C. A. 641, 12 U.  
S. App. 601, 57 Fed. 924; Bedford Quarries Co. v. Bough, 168 Ind.  
671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Ellis v. Southern R. Co. 90  
C. C. A. 270, 163 Fed. 686; Shepard v. Boston & M. R. Co. 158 Mass.  
174, 33 N. E. 508; Lynch v. Boston & A. R. Co. 159 Mass. 536, 34  
N. E. 1072; Bergston v. Chicago, St. P. M. & O. R. Co. 47 Minn.  
486, 50 N. W. 531; McCadden v. Abbot, 92 Wis. 551, 66 N. W. 694;  
Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542;  
Nixon v. Chicago, R. I. & P. R. Co. 84 Iowa, 331, 51 N. W. 157; Lor-  
ing v. Kansas City, Ft. S. & M. R. Co. 128 Mo. 349, 31 S. W. 6; Grand  
Trunk R. Co. v. Baird, 36 C. C. A. 574, 94 Fed. 950; Olson v. St.  
Paul, M. & M. R. Co. 38 Minn. 117, 35 N. W. 866; Railway Co. v.  
Leech, 41 Ohio St. 391; Wabash R. Co. v. Skiles, 64 Ohio St. 458, 60  
N. E. 576; Spicer v. Chesapeake & O. R. Co. 34 W. Va. 514, 11  
L.R.A. 385, 12 S. E. 553; Christy v. Chesapeake & O. R. Co. 35  
W. Va. 117, 12 S. E. 1111; Everett v. Great Northern R. Co. 100 Minn.  
309, 9 L.R.A.(N.S.) 703, 111 N. W. 281, 10 A. & E. Ann. Cas. 294;  
New York, C. & St. L. R. Co. v. Martin, 35 Ind. App. 669, 72 N. E.  
654; Harty v. Central R. Co. 42 N. Y. 468; Cleveland, A. & C. R.  
Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602, 64 N. E.  
582; Hinz v. Chicago, B. & N. R. Co. 93 Wis. 16, 66 N. W. 718;  
Baker v. Chicago, R. I. & P. R. Co. 95 Iowa, 163, 63 N. W. 667;  
Guthrie v. Great Northern R. Co. 76 Minn. 277, 79 N. W. 107;  
Schulz v. Chicago, M. & St. P. R. Co. 57 Minn. 271, 59 N. W. 192;  
Murran v. Chicago, M. & St. P. R. Co. 86 Minn. 470, 90 N. W.  
1056; Jolly v. Detroit, L. & N. R. Co. 93 Mich. 370, 53 N. W. 526;  
Beach, Contrib. Neg. §§ 133-138.

Rule different where employment engages the whole attention.

Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; 20 Am. & Eng. Enc. Law, p. 145, and cases cited; Holland v. Chicago, M. & St. P. R. Co. 18 Fed. 243.

Employees must anticipate train's approach at any time. Loring v. Kansas City, Ft. S. & M. R. Co. 128 Mo. 349, 31 S. W. 6; Shepard v. Boston & M. R. Co. 158 Mass. 174, 33 N. E. 508; Olson v. St. Paul, M. & M. R. Co. 38 Minn. 117, 35 N. W. 866.

Persons on track away from stations or crossings have no right to rely upon signals. Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Kirtley v. Chicago, M. & St. P. R. Co. 65 Fed. 386; Blount v. Grand Trunk R. Co. 9 C. C. A. 526, 22 U. S. App. 129, 61 Fed. 375; Olson v. St. Paul, M. & M. R. Co. 38 Minn. 117, 35 N. W. 866; Magee v. Chicago & N. W. R. Co. 82 Iowa, 249, 48 N. W. 92; Holland v. Chicago, M. & St. P. R. Co. 18 Fed. 243; Nixon v. Chicago, R. I. & P. R. Co. 84 Iowa, 331, 51 N. W. 157.

It was contributory negligence to walk on track without any observance as to approaching trains. Ring v. Missouri P. R. Co. 112 Mo. 220, 20 S. W. 436; Hammond v. Chicago & G. T. R. Co. 83 Mich. 334, 47 N. W. 965; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; Hinz v. Chicago, B. & N. R. Co. 93 Wis. 16, 66 N. W. 718; Illinois C. R. Co. v. Lee, 71 Miss. 895, 16 So. 349.

*Calder & Germain, and Guy C. H. Corliss, for respondent.*

It was negligence to run a train through a yard, near a station, at high speed, in a blinding snow storm, with snowplow throwing clouds of snow, the bell being "out of commission," without giving signals to persons lawfully on the track. St. Louis & T. H. R. Co. v. Eggmann, 60 Ill. App. 291, affirmed in 161 Ill. 155, 43 N. E. 620; Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046; Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 15 Am. St. Rep. 559, 15 N. E. 181; Kelly v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 588; Guggenheim v. Lake Shore & M. S. R. Co. 66 Mich. 150, 33 N. W. 161; Anderson v. Great Northern R. Co. 15 Idaho, 513, 99 Pac. 91; Nichols v. Chicago, B. & Q. R. Co. 44 Colo. 501, 98 Pac. 808; Gesas v. Oregon Short Line R. Co. 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93

Pac. 274; Illinois C. R. Co. v. Murphy, 123 Ky. 787, 11 L.R.A. (N.S.) 352, 97 S. W. 729.

An employee not under obligations to expect a train is not guilty of contributory negligence if he fails to keep a lookout. *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169, 42 N. W. 863; *Scott v. St. Louis, I. M. & S. R. Co.* 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 A. & E. Ann. Cas. 212; *French v. Taunton Branch R. Co.* 116 Mass. 537; *McGhee v. White*, 13 C. C. A. 608, 31 U. S. App. 366, 66 Fed. 502; *Ferguson v. Wisconsin C. R. Co.* 63 Wis. 145, 23 N. W. 123; *Phillips v. Milwaukee & N. R. Co.* 77 Wis. 349, 9 L.R.A. 521, 46 N. W. 543; *Duane v. Chicago & N. W. R. Co.* 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394; *Palmer v. Detroit, L. & N. R. Co.* 56 Mich. 1, 22 N. W. 88; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Baker v. Kansas City, Ft. S. & M. R. Co.* 122 Mo. 533, 26 S. W. 20; *Bowen v. New York C. & H. R. R. Co.* 89 Hun, 594, 35 N. Y. Supp. 540; *York v. Maine C. R. Co.* 84 Me. 117, 18 L.R.A. 60, 24 Atl. 790; *Randall v. Connecticut River R. Co.* 132 Mass. 269; *Alabama & V. R. Co. v. Summers*, 68 Miss. 566, 10 So. 63.

Employee is not careless who assumes that the railroad company will not be. *Elgin, J. & E. R. Co. v. Hoadley*, 220 Ill. 462, 77 N. E. 151; *Thomp. Neg.* §§ 3772, 4518, 4519; *St. Louis & T. H. R. Co. v. Eggmann*, 60 Ill. App. 291, affirmed in 161 Ill. 155, 43 N. E. 620; *Shoner v. Pennsylvania Co.* 130 Ind. 170, 28 N. E. 616, rehearing 130 Ind. 179, 29 N. E. 775; *Atchison, T. & S. F. R. Co. v. McElroy*, 76 Kan. 271, 13 L.R.A. (N.S.) 620, 123 Am. St. Rep. 134, 91 Pac. 785.

Employee can lawfully rely on night operator's statement as to movement of trains. *Gesas v. Oregon Short Line R. Co.* 33 Utah, 156, 13 L.R.A. (N.S.) 1074, 93 Pac. 274; *Sheridan v. Baltimore & O. R. Co.* 101 Md. 50, 60 Atl. 280; *Texas & N. O. R. Co. v. McDonald*, — Tex. Civ. App. —, 85 S. W. 493.

The plaintiff brought this action against the defendant railroad company to recover for injuries received by being struck by a snow-plow operated by defendant. The appeal is from an order denying judgment notwithstanding the verdict and a new trial, and from the

judgment entered on the verdict in favor of the plaintiff. In brief the case may be stated as follows: About 8 o'clock on the morning of January 25, 1907, plaintiff, who was in the employ of the defendant as section hand at Bartlett station, in company with three other section hands, was sent by the foreman from the station at Bartlett to shovel snow into an engine standing on the passing track about 1,600 feet west of the station. A blizzard had been raging two days prior to the accident, and the line of the defendant was blockaded and trains were tied up. At this station, about 8 feet north of the main track, is a passing track extending for a distance of 2,000 feet east and a like distance west of the station house. Passenger train No. 6 had been stalled on the passing track for more than twenty-four hours. It was east bound, with two engines, and the first engine was about 50 feet west of the depot door, and the train extended westerly 500 or 600 feet. There was a little breeze from the northwest, and the temperature was about 30 degrees below zero. Plaintiff and his companions were dressed in fur-lined coats, the collars turned up, and their caps were drawn down over the ears. Plaintiff testifies that before he left the station he was told by the night operator that no trains were coming, and, when he left the depot, the block signal was out. The operator denies telling him so. This block signal standing out was to notify incoming trains to stop at the station. Passenger train No. 1 is a through limited train running west, and passes through Bartlett station at full speed, or nearly so, without stopping. A crew consisting of an engineer and firemen and brakeman and others was sent west from Grand Forks on the 26th, with orders to run as the first section of No. 1, and clear the track of snow. This crew was in charge of an outfit, consisting of an engine preceded by a car loaded with coal to hold it down, and on the front of which was a snowplow with high flanges. Plaintiff and his companions walked west on the main track for the reason that the stalled passenger train prevented their walking on the side track, and after passing the train it was easier to walk on the main track than on the side track, because there was less snow on the latter. When they had proceeded about 1,400 feet west from the station, one of plaintiff's companions happened to turn his head to the rear, saw the snowplow close upon them, and warned his companions to jump. All succeeded in clearing the snowplow except



the plaintiff, who was hit and injured. No question is made as to the amount of the verdict; it being conceded that, if he is entitled to recover at all, the judgment of \$2,000 is not excessive. The engineer had been directed to open up the line for trains following and those which might be stalled ahead of him. The bell was clogged with snow, and could not be rung; and the engineer was advised at different stations, including Lakota, 4 miles east of Bartlett, that the track was clear. It is shown that in opening a snow blockade it is necessary to maintain a speed of about 25 miles per hour to do effective work, and inasmuch as the snow is generally deeper around station buildings and in yards than in the open country, high speed must be maintained while passing stations to avoid getting stalled. The station whistle was given for Bartlett. About 250 or 300 feet east of the depot is a crossing. The evidence is in conflict as to whether the whistle was blown for that crossing, but the jury found that it was not. It is the custom of the road for the engineer to give a certain whistle as a signal when approaching or passing a side-tracked train if followed by a second train or section. All the train men and the assistant superintendent of the read, who was on the snowplow train, testified that this signal was given to the stalled train at Bartlett. One witness for the plaintiff, who was in the station at Bartlett at the time the snowplow passed, testified that he did not hear such signal, and the plaintiff and his companions testified that they heard no signal and that they could hear the whistle half a mile. The jury also found, in answer to a question, that the locomotive hauling the snowplow did not whistle signals to train No. 6, and that train No. 6 did not answer any such signals. The flying snow prevented the engineer seeing the signal until he had passed it, and he did not stop until after plaintiff was struck by the plow. The trial court charged the jury that, as a matter of law, the maintenance of the rate of speed through the station was not negligence; but that, regardless of whether there were obstructions by smoke or snow or otherwise to the view of the engineer in passing through the yards at the station, it was his duty to sound the whistle of his engine so that persons located about where the plaintiff was when hit, would, under ordinary circumstances, have heard the whistle in time, by the exercise of ordinary diligence, to step from the main track and out of danger. Numerous errors are assigned, but the main contentions are

21 N. D.—4.

that the instructions to the jury that it was the duty of the engineer to sound the whistle was error, and that the evidence shows, as a matter of law, that plaintiff was guilty of contributory negligence.

SPALDING, J. (after stating the facts as above.) 1. The question of the negligence of the appellant was for the jury, and the court erred in instructing the jury that in law it was the duty of the engineer to sound the whistle while passing through the yards at Bartlett. The question of negligence is usually one of fact to be determined by the surrounding circumstances. It is impossible in many instances to establish any fixed rule as to when a railroad should sound a whistle or ring a bell. The legislature has required this to be done in some cases, but it does not follow that it should not be done in others because not exacted by statute. *Gesas v. Oregon Short Line R. Co.* 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 279; *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169, 42 N. W. 863. Here was a long side track liable to be occupied by trains, and in fact occupied by a long passenger train headed by two locomotives, and another locomotive further west. A storm had raged resulting in the track being drifted and the road blockaded. The evidence shows, and all persons who use their faculties of observation know, that among the places where snow collects in piles during a storm to the greatest depth are the railroad yards and around station buildings, and men are frequently employed at such times in clearing the tracks and yards with shovels and by other means. On the other hand it was not shown that any rule required the engineer to sound an alarm, and it appears that no custom existed to do so. Bartlett is a very small station, the depot at the extreme western limit of the village, and the place where the accident occurred is on the uninhabited prairie, and there were no crossings or buildings west of the station. The engineer had been informed at the last station that the track was clear. He did not know that the passing track was occupied or that plaintiff or others were on the track. It was for the jury to say whether, taking into consideration the length of the side track, the location of the buildings, the custom, and all other surrounding conditions and circumstances, ordinary care required the engineer to signal as a warning to men liable to be so engaged when passing through Bartlett. The fact that the bell was ob-

structed, putting it out of use, is immaterial. It is shown that the whistle was in commission. We are satisfied that the minds of reasonable men might disagree as to what might constitute reasonable care under such circumstances. The court eliminated the question of signals for the crossing and for the stalled train. Had such signals been given, they would have been given for other purposes, but might have served to warn the respondent of danger. In *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169, 42 N. W. 863, it is held that under some circumstances the law implies a duty to give a signal of the movement of an engine, independent of the rules prescribed by the company. In *International & G. N. R. Co. v. Hester*, 64 Tex. 401, it is held that when a party accepted the employment as section hand, he assumed all the risks ordinarily incident to such employment and that the company would not be liable to him for injuries resulting from such assumed risks, but if the injuries were occasioned by superadded risks resulting from the negligence of the company or its immediate representative, a liability would exist for which he would be entitled to recover, unless in some way or other he contributed to the injury by failure on his part to exercise such reasonable care as the occasion required.

2. The question of the contributory negligence of the respondent is one presenting greater difficulties. It is unquestionably the general rule that the track man or section hand ordinarily assumes the risk from danger incident to his occupation, and that he must protect himself from approaching trains, especially where he is not at the time occupied with duties which require his attention. But there are exceptions to this rule. The question in this case is whether the facts and circumstances disclosed were so unusual as to justify the jury in finding that they relieved the respondent from this assumption of risk, and, consequently, from his duty to keep his own lookout for trains. It is urged that, as a matter of law, he was guilty of contributory negligence. In determining what constitutes ordinary care under any circumstances, the jury is entitled to take into consideration all the surrounding conditions and circumstances, the age, intelligence, and experience of the plaintiff, and, consequently, the information possessed by him upon which he bases his act or failure to act. In the case at bar it may be assumed that he had no right to rely upon

whistles at crossings east of Lakota, which it was doubtful about his ability to hear. But he saw the block signal. The block signal was a standing order for all trains to stop at the station and before passing it. He was told by the night operator, at least we must assume that he was, that no trains were coming. These were rightful elements entering into the question of his carelessness or lack of ordinary care. They rendered the circumstances unusual, or, as some courts state it, extraordinary or exceptional. Whether they were sufficient to relieve him from the duty to protect himself, with which he otherwise would have been charged, was a question for the jury under all the circumstances. It is true that the block signal might have dropped at any instant. It is likewise true that the night operator was not an agent of the appellant for the purpose of giving such information to the respondent and thereby binding the appellant, but this is not the theory on which evidence of this nature is admissible or on which it should be weighed by the jury. The court and jury must arrive in some manner at the facts surrounding an act complained of, for the purpose of forming a judgment as to the alleged act of contributory negligence. The plaintiff in one instance uses his eyesight, in another his hearing; and we see no reason why it was not competent for the jury to consider and weigh the testimony regarding the use by respondent of both these faculties in the instant case. In the natural course of events about five or six minutes elapsed after he left the depot before the happening of the accident. While the block signal might have been dropped during this time, the fact of its being displayed was entitled to some weight. The information given by the operator was likewise for the consideration of the jury. He was the party ordinarily supposed to have knowledge of the approach of trains, and the evidence shows that he received his information from such sources that the approach of a train between Lakota and Bartlett at that time, without his knowing it, was improbable. We refer briefly to a number of authorities more or less in point. In *McGhee v. White*, 13 C. C. A. 608, 31 U. S. App. 366, 66 Fed. 502, Judge Taft, speaking for the circuit court of appeals of the sixth circuit, held that where a person crossing a railroad track failed to look for a second train after one had passed, when he was about 40 yards from the crossing, the question of his contributory negligence was for the jury,

basing the conclusion of the court upon the ground that the unusual circumstance of a second train following the first at so short a distance and at a high speed served to relieve the injured party from the charge of contributory negligence in law. In *Jordan v. Chicago, St. P. M. & O. R. Co.* 58 Minn. 8, 49 Am. St. Rep. 485, 59 N. W. 633, it is held that the rule that one is guilty of contributory negligence *per se*, who places himself upon a railway track without looking and listening, is not applied to one employed in a railroad yard and whose duties frequently make it necessary for him to go upon the tracks, and that his failure to look and listen may be negligence or not according to the circumstances, of which the jury are to judge. In *Sheridan v. Baltimore & O. R. Co.* 101 Md. 50, 60 Atl. 280, it was held that the defendant was liable for an injury inflicted on a person crawling through a train standing upon a track and started without signal or warning, when told by the brakeman that he would have time to cross. That court held that he was not guilty of contributory negligence in law, but that it was a question for the jury. To the same effect see *Gesas v. Oregon Short Line R. Co.* 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 279, where it is also held that the duty of a railway company to use reasonable care in the operation of trains applies to all cases where the failure to exercise it may result in injury to others. In that case the brakeman told the injured party that the train would not move for half an hour, and no warning was given, and questions of negligence and contributory negligence were held to be for the jury. See also *Elgin, J. & E. R. Co. v. Hoadley*, 220 Ill. 462, 77 N. E. 151; *Shoner v. Pennsylvania Co.* 130 Ind. 170, 28 N. E. 616, 29 N. E. 775. In *Scott v. St. Louis, I. M. & S. R. Co.* 79 Ark. 137, 116 Am. St. Rep. 67, 95 S. W. 490, 9 A. & E. Ann. Cas. 212, the supreme court of Arkansas held that where it appears that the circumstances were such that an ordinarily prudent person might not have expected a train to pass at that moment, the question of contributory negligence should be submitted to the jury, and that where the circumstances are so unusual that the injured party could not, reasonably, have expected the approach of the train at the time he went upon the track, the question of contributory negligence is for the jury. See the valuable note on the subject of "reasonable belief that no train is approaching as relieving one from the imputation of

negligence *per se* in failing to look and listen," in 9 A. & E. Ann. Cas. 216. To the same effect see *Schulz v. Chicago, M. & St. P. R. Co.* 57 Minn. 271, 59 N. W. 192.

3. A large number of rulings on the admission of evidence are assigned as error, but the decision of these two questions covers most of them. We shall only briefly refer to a few regarding which doubt may exist.

(a) The respondent was permitted to testify that, while traveling west on the track, he did not feel that there was any danger to be anticipated from the coming of a train. This was followed by his reasons for feeling safe. We think, when taken together, his testimony on this subject may fairly be construed as elicited for the purpose of laying the foundation for showing the information regarding trains, upon which he was acting, and that the question objected to served to introduce the subject, and not primarily to emphasize the mental process or physical sensations of respondent. The form in which the question was put may not have been the most artistic, and the sequence of questions may not have been wholly logical, but we see no reason for concluding that the defense was prejudiced thereby.

(b) Error is assigned because respondent was permitted to testify as to the custom regarding walking on the track. We are disposed to view this as immaterial, but its admission nonprejudicial.

(c) We think it was error to admit evidence showing the rate of speed at which a freight engine had passed through Bartlett on a certain occasion, without showing the rate of speed at which trains were accustomed to pass that station when not stopping. The speed of one engine on a single occasion would not furnish any criterion by which to determine whether the speed of the snowplow was excessive, even if that question were involved, and we think it was not.

(d) Evidence regarding the ability of witnesses to hear the whistle of an engine while working on the yard was improperly admitted, for the reasons that the conditions were not shown to be similar, but we think this was cured by the instructions.

The respondent states in his brief that on the motion for judgment notwithstanding the verdict or for a new trial, the motion for a new trial was abandoned, and that the appellant relied solely upon the motion for judgment. The record, however, fails to disclose this to be the fact, and the appeal was argued by the appellant on both proposi-

tions. Under the circumstances, we do not feel at liberty to ignore the motion for a new trial, whatever may have been the fact relative to its presentation to the trial court.

We think it unnecessary to pass specifically upon other questions, as they are sufficiently covered by our conclusions on the principal assignments or of the court's instructions, or are without merit.

Because of the error in instructing the jury referred to in paragraph 1, the order of the District Court denying a new trial is reversed and a new trial granted. All concur.

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ADVANCE THRESHER COMPANY v. JOHN A. BECK.

(128 N. W. 315.)

**Taxation — Priority of Liens for Taxes on Personal Property.**

Section 1557, Rev. Codes 1905, giving to the state and county a preference in the collection of personal property taxes over any and all liens on or against the personal property of the tax debtor, construed, and

*Held*, that the legislative intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by a lien and property included in the same class and assessed with it as one indivisible item as disclosed by the assessment list.

Opinion filed October 13, 1910.

Appeal from District Court, McLean county; *W. H. Winchester, J.*  
Action to recover the amount of certain personal property taxes paid under protest. From an order overruling a demurrer to the answer, plaintiff appeals.

Affirmed.

*Turner & Lewis (Engerud, Hold, & Frame of counsel)*, for appellants.

Personal property taxes cannot be made a lien paramount to prior mortgage. *Binkert v. Wabash R. Co.* 98 Ill. 216; *State, Macknet, Prosecutor, v. Newark*, 42 N. J. L. 38; *Bibbins v. Clark*, 90 Iowa, 230, 29 L.R.A. 278, 57 N. W. 884, 59 N. W. 290; *Parsons v. East St. Louis Gaslight & Coke Co.* 108 Ill. 380, and cases there cited.

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Note.—Priority of claims for taxes against the assets of a debtor, see note in 29 L.R.A. 278.

Priority of claim for taxes against property in hands of receiver, see note in 2 L.R.A.(N.S.) 1052.

Taxes may be paid under protest and suit to recover brought. *St. Anthony & D. Elevator Co. v. Bottineau County* (St. Anthony & D. Elevator Co. v. Soucie), 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; *Gaar, S. & Co. v. Sorum*, 11 N. D. 164, 90 N. W. 799.

*J. E. Nelson*, for respondent.

Where a law is enacted it becomes a part of every subsequent contract. *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489; *Burdick v. People*, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; *Phinney v. Phinney*, 81 Me. 450, 4 L.R.A. 348, 10 Am. St. Rep. 266, 17 Atl. 405; *Von Hoffman v. Quincy*, 4 Wall. 550, 18 L. ed. 403.

Tax lien is not displaced by foreclosure of a prior lien. *Bloxham v. Consumer's Electric Light & Street R. Co.* 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444.

FISK, J. This is an appeal from an order of the district court of McLean county overruling a demurrer to the answer. The object of the action is the recovery of a certain sum paid by plaintiff to defendant under protest, in satisfaction of certain personal property taxes assessed and levied against one Hayes Bollman for the years 1904 to 1907 inclusive. The facts are not in dispute, and briefly stated are as follows: On September 14, 1906, plaintiff, being the owner of a certain threshing separator, sold and delivered the same, together with certain other personal property, to said Bollman for the agreed consideration of \$1,210, the latter executing and delivering to plaintiff his note representing the purchase price of such property payable October 1, 1908, and to secure the payment thereof he executed and delivered to plaintiff a chattel mortgage upon the property thus sold, which chattel mortgage was duly filed for record on September 15, 1906. No part of such mortgage indebtedness has been paid, and plaintiff is still the owner and holder thereof. On April 15, 1909, there was placed in defendant's hands, as sheriff of McLean county, a warrant commanding him to collect certain delinquent personal property taxes levied and assessed against the said Bollman as follows: For the year 1904, \$3.04; 1905, \$2.50; 1906, \$13.08, and 1907, \$55.13. Pursuant to such warrant defendant, as such sheriff, on said date levied upon and seized the separator aforesaid, and



caused the same to be advertised for sale to satisfy such taxes, claiming the right to subject said property to the payment of certain taxes and the interest and penalty thereon, in disregard of plaintiff's rights under its chattel mortgage and over the remonstrance and protest of plaintiff, that the total amount claimed to be due for such tax, interest and penalty, was \$102.15, which sum plaintiff, in order to prevent a sale of said separator, was required to pay and did pay to defendant under protest, and it is to recover back such money that this action was instituted.

The answer admits all the allegations of the complaint, after which it alleges that during each of the years from 1904 to 1907 inclusive, the said Bollman was the owner and in possession of certain personal property; that the same was duly assessed to him in certain amounts stated, and that taxes were levied and assessed thereon in the amounts stated in the complaint. Among other things the answer contains the following: "During the year 1906, as described in plaintiff's complaint, the said Hayes Bollman was the owner of an Advance Separator, No. 18,415, upon which the plaintiff in this action held and still holds a chattel mortgage; that said separator was duly assessed during the year 1907 to Hayes Bollman; that during the year 1906 the said Hayes Bollman was also the owner of an Advance Engine, shop No. 9,445, which was also duly assessed to him, and which said engine was included in the mortgage given by the said Hayes Bollman to the Advance Thresher Company on the 14th day of September, 1906; that the value of said separator and engine so assessed in the year 1907 was in the sum of nine hundred eighty dollars (\$980), and that the total amount of taxes levied and due upon said engine and separator so included in the mortgage of the plaintiff herein is in the sum of forty-six and eighty-five hundredths dollars, no part of which has been paid by the said Hayes Bollman."

On the part of the defendant it is contended that the mortgaged property being owned and in the possession of Bollman, the tax debtor, on April 15, 1909, the county had a lien thereon for the amount of all of such taxes, interest, and penalty, and hence that such property was rightfully seized and distrained for the payment thereof.

Appellant concedes that the provisions of the statute (§ 1557, Rev. Codes 1905), if constitutional, are broad enough to justify respondent's

contention, but it asserts that such statute violates both the state and Federal Constitutions, inhibiting the taking of property without due process of law and impairing the obligation of contracts.

Section 1557 reads as follows: "The right of the state and each and every county thereof to enforce the collection of personal property taxes shall take and have precedence of any and all liens on or against personal property of a tax debtor; provided, that any person holding a lien on personal property of any tax debtor may demand and require the property of the tax debtor not covered by a lien to be first exhausted in the payment of such taxes." Commenting upon this section, counsel for appellant, in their brief, say: "The legislature has by this enactment sought to make all personal property taxes, past, present, and future, and regardless of what property was assessed therefor, a first lien against all the world upon all personal property of the tax debtor, regardless of when or how it was acquired or the lien created."

If this statute must receive the broad construction thus placed upon it by appellant's counsel, it is, to say the least, the most harsh and drastic statute upon the subject which has come to our knowledge. Giving the statute such construction, it authorizes and requires the taking of the property of one citizen to pay the debt of another. Not only this, but it renders possible the complete wiping out and destroying of contract rights. Such a statute, if thus construed, would be abhorrent to natural justice. Before such a construction can be placed upon the statute, the legislative intent that it should receive such construction should be clear and unquestionable. Whether such a statute would be within the legitimate exercise of legislative power, we are not required to determine in this case, as we are agreed that the construction given the statute by appellant's counsel is not sound, and that as we construe it the same is not vulnerable to any attack upon constitutional grounds or otherwise. The history of this statute furnishes some aid in construing the same. It was enacted as an independent statute in 1901 (Laws 1901, chap. 150). As the bill for this act was introduced and first passed in the house, the legislative journal discloses that the proviso was not annexed thereto, but that such proviso was added as a senate amendment. Manifestly the purpose of the original bill was not to create a lien for taxes at all, but

merely to create a preference right in favor of the state and counties in the enforcement of the collection of personal property taxes. It was no doubt merely the intention to create a preference in the distribution of the proceeds of the property where the same has been converted into a fund either by an executor, administrator, receiver, or otherwise. Analogous statutes have been thus construed. *Anderson v. State*, 23 Miss. 459; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 305; *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370. In the first case cited, the section of the statute of Mississippi under consideration provided that "taxes imposed by the act shall be preferred to all payments, executions, encumbrances, and liens of any description whatsoever. . . ." Among other things the court said: "There is no lien expressly given as to the personal property of the tax debtor by the statutes above quoted. If it existed at all, it must result from the priority of payment secured to the state. But a right of prior payment does not of itself constitute a lien. The distinction is an obvious one: A lien is said to be a qualified right, which, in a given case, may be exercised over the property of another. *Lickbarrow v. Mason*, 6 East, 20, note, 4 Eng. Rul. Cas. 756. It attaches to the subjects of property, and follows them in their transmission to others. Priority in payment is a preference in the appropriation of the proceeds of the debtor's property. Hence, if before it has attached, there is a bona fide transfer of the property, the right will be lost."

The 5th section of the act of Congress, 1797, secured to the United States priority of payment out of the estates of insolvent debtors, and, as the Mississippi court said, "the effect of this act is not materially different from the statute under consideration," yet the Supreme Court of the United States in the above cases, on great deliberation, held "that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors."

Why should the legislature, by the enactment of said statute, provide for a lien upon the tax debtor's property in the face of § 1572, Rev. Codes, then in force which already made such provision? If the bill as originally introduced had become a law, we should be inclined to adopt the reasoning of the Mississippi court, as above stated. But under the terms of the bill as finally passed, with the senate

amendment thereto, we are forced to the conclusion that the legislative intent must have been to create in favor of the state and counties, not only a preference right in the collection of taxes, but also to give to the personal property tax lien already prescribed by § 1572, Rev. Codes, priority over other liens on the property. The language employed in the proviso to the act seems to leave room for no other construction. It does not follow, however, that the legislative intent was to create such priority of lien in favor of the state and counties, except to the extent of the amount of taxes assessed and levied against the particular personal property, and property included in the same class as disclosed by the statutory assessment list. This appears to us to be a reasonable construction of this somewhat vague statute, and such construction obviates the constitutional objections urged by appellant's counsel against the same. It is concededly proper for the legislature to provide that taxes assessed against each class of personal property should have priority over all other liens thereon. This is in harmony with the law relating to real-estate taxes. But, as before stated, it would be grossly unjust, if not in excess of legislative power, to give to the tax lien for taxes on one class of property priority over all other liens on property of another and entirely distinct class. In the absence of a statute clearly disclosing such intent, we are unwilling to attribute such a purpose to the legislature.

By § 1496, Rev. Codes, the legislature has seen fit to require the assessor to fix the true and full value of all items of personal property included in the assessment list, and to that end the statute prescribes how the property shall be classified and that the value of each class shall be separately fixed. In subdivision 11 of said section all threshing machines, engines, and boilers are designated as one class, and treated as one item for the purpose of taxation, and by § 1523, Rev. Codes, the local board of review is required, in equalizing the assessments, to follow out the same scheme of classification. By these statutes, therefore, the property in each class is treated as one indivisible item of personal property, and, as before stated, we believe it was the legislative intent, in creating a preference right in the collection of taxes, as prescribed in § 1557, to limit the same so that as to each class of property the state and counties shall have priority only in so far as the taxes levied against such property are concerned.

Any other construction would work manifest hardship, if not confiscation of property. As said by the Arkansas court, any other construction "would burden personal property with secret liens to an extent to be abhorred, and would be a restraint upon the free exchange and alienation of personal property, that ought not to be drawn from the statute, when the meaning is not clearly manifested." *Bridewell v. Morton*, 46 Ark. 73. See also *Binkert v. Wabash R. Co.* 98 Ill. 205.

Applying the above rule of statutory construction to the facts of this case, it follows that defendant had the right to sell the threshing machine in question to satisfy the tax assessed and levied in the year 1907, against such machine and the engine included in its class, together with the interest and penalty thereon, but no more, and plaintiff is entitled to recover the excess of this amount so paid under protest. No point is made as to defendant, instead of McLean county, being the proper party defendant. The answer therefore alleges a partial defense, and the demurrer thereto was accordingly properly overruled. All concur.

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G. A. SPICER and S. S. Davis, Copartners doing business as Spicer & Davis, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation.

(128 N. W. 302.)

**Railroads — Fires — Evidence — Verdict.**

1. In an action to recover damages resulting from prairie fires negligently caused by defendant's servants, evidence examined and

*Held*, insufficient to justify the verdict, the record presenting a case of total failure of proof as to the extent of the damages suffered.

**New Trial — Sufficiency of Evidence.**

2. The complaint alleges four separate and distinct causes of action, in two of which plaintiff seeks to recover for alleged negligence in killing certain animals. A general verdict for \$350 was returned, and the record does not disclose upon what the verdict was based.

*Held*, error to deny defendant's motion for a new trial.

Opinion filed October 13, 1910.

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Note.—Liability of railroad for setting fires which spread to property of others, see notes in 21 L.R.A. 262; 23 L. ed. U. S. 357; and 62 Am. St. Rep. 171.

Appeal from District Court, Stutsman county; *Edward T. Burke, J.* Plaintiff recovered a verdict for \$350, and from an order denying a motion for a new trial, defendant appeals.

Reversed and new trial ordered.

*Ball, Watson, Young & Lawrence*, for appellant.

Damages must be alleged and proven with reasonable certainty by competent evidence. 13 Cyc. Law & Proc. pp. 214, 215, 218, 219.

Where the proof shows damages, but not with reasonable certainty their extent, nominal damages alone should be awarded. *M'Cutchin v. Batterton*, 1 Mo. 342; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110; *Hair v. Barnes*, 26 Ill. App. 580; *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 48, 41 N. E. 640; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541; *Howard v. Taylor*, 99 Ala. 450, 13 So. 121; *Hayes v. Delzell*, 21 Mo. App. 679; *Davis v. Texas & P. R. Co.* — Tex. Civ. App. —, 42 S. W. 1008; *International & G. N. R. Co. v. Simcock*, 81 Tex. 503, 17 S. W. 47; *Texas & P. R. Co. v. Curry*, 64 Tex. 87; 1 *Sutherland, Damages*, p. 917; *Van Alstyne v. Morrison*, 33 Tex. Civ. App. 670, 77 S. W. 655; *Muldowney v. Illinois C. R. Co.* 36 Iowa, 462; *Trapnell v. Red Oak Junction*, 76 Iowa, 744, 39 N. W. 884; *Nichols v. Dubuque & D. R. Co.* 68 Iowa, 732, 28 N. W. 44; *White v. Spangler*, 68 Iowa, 222, 26 N. W. 85; *Eckerd v. Chicago & N. W. R. Co.* 70 Iowa, 353, 30 N. W. 615; *Winter v. Central Iowa R. Co.* 74 Iowa, 448, 38 N. W. 154; *Hobbs v. Marion*, 123 Iowa, 726, 99 N. W. 577; 5 *Current Law*, p. 937; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 482; *Smith v. Evans*, 13 Neb. 314, 14 N. W. 406; *Galveston, H. & S. A. R. Co. v. Rheiner*, — Tex. Civ. App. —, 25 S. W. 971; *Williams v. Brown*, 76 Iowa, 643, 41 N. W. 377; *Mackey v. Monahan*, 13 Colo. App. 144, 56 Pac. 680; *Waldrop v. Greenwood, L. & S. R. Co.* 28 S. C. 157, 5 S. E. 471.

*John Knauf*, for respondent.

**FISK, J.** Defendant appeals from an order denying its motion for judgment *non obstante veredicto* or for a new trial. It relies, for a reversal of the order, solely upon the ground of alleged insufficiency of the evidence to justify such verdict.

Four distinct causes of action are set forth in the complaint, based

upon alleged acts of negligence on defendant's part in setting certain prairie fires, which spread to plaintiffs' lands, and in injuring certain animals belonging to them by alleged negligence in operating its trains. No question is raised as to the improper joinder of these several causes of action. Issue was joined by answer upon each cause of action, and the jury returned a general verdict in plaintiffs' favor for the sum of \$350. The abstract presents for our consideration merely the evidence relating to the causes of action based upon the prairie fires, and the issues were, by express admissions of defendant's counsel, narrowed to the single questions as to whether the fire burned over plaintiffs' lands, and if so, the extent of plaintiffs' damages thereby caused. The evidence abundantly established that the fires spread and burned over plaintiffs' lands as alleged, but it is wholly lacking as to the extent of the detriment thereby suffered by plaintiffs. We have searched the printed record in vain to find any testimony upon which the verdict can be permitted to stand. We are unable to find even a scintilla of evidence to warrant the trial court in submitting to the jury these causes of action. Certain testimony was offered by plaintiffs' counsel, bearing upon the question of the extent of the damage, but the same was rejected by the trial court on defendant's objection. Whether these rulings constituted error, it is unnecessary to determine. Whether correct or not, the fact remains that, as the record stands, there was nothing upon which the jury could base a finding as to damages, and it was, therefore, error to submit the question to them. It is elementary that a jury will not be permitted to arrive at a verdict on mere speculation, conjecture, or guess; and this is what they were forced to do in this case in so far as two of the causes of action are concerned. Respondents' contention that appellant cannot profit by error which it invited is no doubt correct, but it does not meet the question here presented; for, as we view the record, there is no testimony, either erroneously or correctly admitted, which would justify a submission of the question of damages to the jury.

While, as before stated, it is unnecessary to a decision of this appeal that the correct rule of damages be determined, we deem it not improper, in view of another trial in the court below, to intimate that the rule contended for by plaintiffs' counsel seems to find support in the case of *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D.

124, 28 L.R.A.(N.S.) 757, 126 N. W. 995, recently decided by this court.

The total sum claimed under the other causes of action was \$200 and interest, and the status of the record is such that we are unable to say whether any portion of the general verdict is based upon these causes of action. We are therefore unable to uphold any part of the recovery, and the order appealed from, in so far as it denied the motion for a new trial, must be reversed and a new trial ordered. All concur.

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## WILLIAM MURRAY v. N. DAVIS.

(128 N. W. 305.)

### **Counties — Division — Legislative Question.**

1. All matters pertaining to a division of counties are purely legislative questions unless regulated by constitutional provisions.

### **Counties — Division — Election — Legal Existence of New County.**

2. On the question of the division of counties, as governed by §§ 2329, 2330, and 2331, Rev. Codes 1905, the election under § 2329 does not confer a legal existence on the new or proposed county.

### **Counties — Division — Legal Existence — Appointment of Commissioners.**

3. Under § 2330, a legal existence is not conferred upon such new county until after the governor has appointed commissioners, and they have accepted and qualified as such.

### **Voters and Elections — Division of Counties — Organization of new Counties.**

4. Until such county commissioners qualify, voters residing in a proposed new county are legal voters of the county about to be divided, and can legally vote on all matters pertaining to that county.

Opinion filed October 21, 1910.

Appeal from the District Court of Ward county; *Kneeshaw, J.*

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Note.—Dividing counties by legislative authority, see notes in 35 Am. St. Rep. 539; and 85 Am. Dec. 101.

Organization of new counties, see note in 20 Am. St. Rep. 680.



Contest of a primary election for a nomination to the office of county judge. Judgment for contestee. Contestant appeals.

Affirmed.

*Geo. A. McGee and H. J. Schull*, for appellant.

*Palda, Aaker, Greene & Kelso*, for respondent.

MORGAN, Ch. J. The contestant and contestee were rival candidates for a nomination to the office of county judge of Ward county, at the primary election of June 29, 1910. The district court gave judgment in favor of the contestee, and Murray has appealed. The question presented is the right of persons residing within the now existing and organized counties of Burke and Renville to vote at that election.

The stipulated facts are: In November, 1908, at the general election held in Ward county, propositions were submitted to a vote on the question whether that county should be divided and the counties of Burke and Renville formed out of part of the territory then comprising it. The election was regularly held, and resulted, according to the official canvass, against a division of the county. The result of this election was contested by residents of the proposed counties of Burke and Renville, and judgments of the district court of Ward county were therein entered, to the effect that the proposition to divide Ward county had not carried, and the contests dismissed. These judgments were each appealed to this court, and on June 3, 1910, a decision was rendered on each of said appeals, whereby said judgments of the district court were reversed, and the propositions submitted at the 1908 election as to the division of Ward county were adjudged to have been duly carried.

After the filing of a remittitur from the supreme court in the district court of Ward county, and on June 8, 1910, district court ordered judgment to be entered pursuant to said remittitur, and judgment was accordingly entered on that day.

On July 15, 1910, the governor of the state duly appointed county commissioners for each of said Burke and Renville counties, and said commissioners duly qualified by taking the required oath, on July 22, 1910. The primary election out of which these contests grow was held in Ward county on July 29, 1910. Prior to that day the county auditor of Ward county had distributed ballots to be voted at said primary.

election, and caused them to be delivered at all the voting precincts of said county, including the precincts within the territory now comprising the counties of Burke & Renville. These ballots were voted in the now existing counties of Burke and Renville, and the precinct officers of these two counties duly certified and returned the result of such election to the county auditor of Ward county, and the returns of the election in these precincts of Burke and Renville counties were duly canvassed by the canvassing officers of ward county, and included in determining what officers had been nominated in Ward county.

If the returns from these precincts were legally canvassed, the contestee was duly nominated. If they were not legally counted, the contestant was duly nominated, and the judgment of the district court was erroneous.

It will be seen that the question before us is whether voters in the territory now embraced within Burke and Renville counties were legal voters at that election for officers of Ward county, before the county commissioners were appointed, which was not done until after the primary election had been held. This involves the question whether these new counties were given a legal existence as such by the election of 1908, or by virtue of the appointment and qualification of the commissioners. If the election gave them a legal existence, it became effectual in November, 1908, as the final decision of the courts only declared the legal effect and results of that election, and it conferred and could properly confer no right to the electors of such counties except such as arose out of such election and the statutes governing the same.

The question of the creation and division of counties is purely a legislative one, unless regulated by the Constitution. The common law has no application thereto. Hence the rights of these parties must be determined by existing statutes, there being no constitutional provisions that affect them. The section of the Code that must control this question is the following, being a part of the chapter governing the division of counties: "If it shall appear that the majority of all the votes cast at such election in each of the counties, proposed new counties, and the remaining part of the county or counties interested is in favor of the formation of such new county, the county auditor of each of such counties shall certify the name, territorial contents, and boundaries of such new county, whereupon the secretary of state shall notify the

governor of the result of such election, whose duty it shall be to appoint three persons, residents of the county so formed, possessing the qualifications of electors, who will accept and qualify in such office, county commissioners for such new counties, who shall hold their office until the first general election thereafter, and until their successors are elected and qualified; and upon the qualifying of such commissioners, such county shall be deemed to have existence as such, and be governed by the laws of the state relating to counties." Rev. Codes 1905, § 2330.

The latter portion of this section is directly applicable, and specifically states when the county comes into existence as a matter of law. It is upon the qualifying of the commissioners. The word "upon" in this connection means after or following, and the section makes the qualifying of the commissioners a condition precedent to clothing the new county with legal existence. The appellant contends that it was the legislative intention in enacting said § 2330, that the word "counties" at the end of the section should be construed to mean organized counties. If this contention be conceded, we do not see how it would affect the question under consideration. The question here is, What was the status of the voters on the proposed new counties, when the primary election was held, and not the status of the county after the commissioners qualified? We think it a fair construction of that section that this county had no existence as a governmental agency of the state until the commissioners qualified.

The appellant contends that the word "formed," in this section, means the same as organized. We do not think so. In that connection the word "formed" means, and relates only to the area of the county, and that division has been determined on and established, so far as the election was concerned. It has no reference to a county equipped with means of government. That word in the connection used does not mean that the election actually disorganized that territory, in view of the language following, that legal existence is conferred after the commissioners are qualified to act. It does not seem that the legislature intended that this territory should be disorganized and the voters disfranchised, until it became a legal entity. It would require clear and express language before such consequences should be visited upon that territory. It would mean that it has no existence or local government, and that the recording acts and criminal statutes

would not apply during the time between the election and the complete organization of the counties. In this case that time was about eighteen months. If such was the intention, it would have been easy to express it.

The fact that this construction of the statute renders it possible for voters in similar cases to participate in the nomination of officers to be elected while such voters had no interest in the matter, inasmuch as territorial conditions make it such that the voters would not be qualified to vote at a subsequent election, does not seem to us important. The question is, Who were legal voters when the primary was held? There is no other time to be fixed as a test of the legality of the voters except the time of voting, regardless of what might happen thereafter.

Appellant relies on *State ex rel. Slipp v. McFadden*, 23 Minn. 40; *Meehan v. Zeh*, 77 Minn. 63, 79 N. W. 655; and *Carleton v. People*, 10 Mich. 250. None of these cases was based upon similar facts or like statutes, and there is nothing decided in them at variance with our conclusion in this case.

Appellant urges that the election, if in favor of division, can determine when these counties were segregated from Ward county, so far as the right to vote on matters pertaining to Ward County are concerned. If not so held, he contends that to permit the voters in these new counties to vote on Ward county matters at the primary was an injustice to Ward county, as the voters in these counties could have no interest in Ward county matters, in view of the fact that complete division was imminent. The paramount question in this case is whether these voters were legal voters when the primary election was held. This is a question of the construction of an unambiguous statute. If hardship and injustice may follow the operation of the statute in this regard, it is not for the courts to disregard the statute for that reason. This territory was part of Ward county when these votes were cast, and therefrom it follows that the judgment of the District Court must be affirmed. All concur.

## WILLIS v. WEATHERWAX.

(128 N. W. 307.)

Opinion filed October 21, 1910.

Appeal from District Court, Ward county; *Kneeshaw, J.*

Election contest between C. C. C. Willis and L. P. Weatherwax.  
Judgment for contestee, and contestant appeals.  
Affirmed.

*Geo. A. McGee* and *H. J. Schull*, for appellant.

*Arthur LeSueur*, for respondent.

**PER CURIAM.** This is a primary election contest proceeding involving questions in all respects similar to the questions involved in the case of *Murray v. Davis* (decided this day by this court) ante, 64, and the two cases having been argued and submitted together under stipulation, and the decision in the case of *Murray v. Davis* being controlling in this case, it is ordered that the judgment of the District Court herein be affirmed. All concur.

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**THE STATE OF NORTH DAKOTA EX REL. D. A. KRAMER v.**  
**A. K. KIEFER** as County Auditor of McHenry County, North Dakota.

(129 N. W. 925.)

Opinion filed October 21, 1910.

**PER CURIAM.** Following the recent decision of this court in *State Dorval v. Hamilton*, 20 N.D. 592, 129 N. W. 916, leads to a reversal of the order appealed from. Some of the questions raised in the case at bar are identical with those decided in *State v. Hamilton*. Others are rendered immaterial by that decision and hence need not be noticed.

Order reversed.

## STATE OF NORTH DAKOTA v. JOSEPH WINBAUER.

( 128 N. W. 679.)

**Intoxicating Liquors — Contempt Proceedings — Evidence — Copy of Revenue Stamp.**

1. In the trial of a criminal contempt proceeding for the violation of an injunctive order enjoining the maintenance of a liquor nuisance, the state, over the objection of defendant, was allowed to introduce in evidence a purported copy of a United States stamp for special tax certified to by the city auditor of Mandan.

*Held*, error for the reason that the statute (Laws 1897, chap. 189), under which a copy of such special tax stamp was filed with said officer, being unconstitutional (see *North Dakota ex rel. Flaherty v. Hanson*, 215 U. S. 515, 54 L. ed. 307, 30 Sup. Ct. Rep. 179), a copy thereof certified to by the city auditor was incompetent evidence for any purpose.

**Intoxicating Liquors — Admission of Evidence — Harmless Error — Testimony of Detectives.**

2. The admission of such exhibit, while error, was nonprejudicial for the reason that the fact of defendant's guilt was established by the direct, positive, and wholly uncontradicted testimony of three witnesses who were in no way impeached or their testimony in any manner discredited. The mere fact that these witnesses were each detectives, employed for the purpose of obtaining proof of violations of law, would not of itself be sufficient to warrant the court in disregarding their testimony.

**Intoxicating Liquors — Criminal Contempt — Taxation of Costs.**

3. Following the rule announced in *State v. Heiser*, 20 N. D. 357, 127 N. W. 72, *held*, that it is permissible to tax against a defendant found guilty of a criminal contempt the costs and disbursements incurred in prosecuting such contempt proceedings. In the absence of a contrary showing, this court will presume that such costs were not arbitrarily, but on the contrary that they were properly, taxed. The record fails to disclose what particular items of costs and disbursements were incurred, hence this court is without the necessary information to enable it to review the action of the trial court in taxing such costs.

Opinion filed November 19, 1910.

'Appeal from District Court, Morton county; *W. C. Crawford, J.*

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Note.—As to question whether proceeding for contempt for violation of an injunction is civil or criminal, see note in 13 L.R.A.(N.S.) 591.

Appellant was convicted of a criminal contempt in violating an injunctive order enjoining the maintenance of a liquor nuisance. From a judgment of conviction he appeals.

Affirmed.

*Tufton & Williams* (*Newton & Dullan* of counsel) for appellant.

*Andrew Miller*, Attorney General, *J. M. Hanley*, State's Attorney, *Alfred Zuger*, *C. L. Young*, *F. C. Heffron*, Assistant Attorneys Generals, for respondent.

FISK, J. Appellant was found guilty of contempt of court, and, in addition to imprisonment in the county jail, he was adjudged to pay a fine of \$300, and the costs and disbursements taxed at \$200. From the judgment thus rendered he has appealed to this court.

But two grounds are urged by appellant's counsel for a reversal. First, it is contended that it was prejudicial error to admit in evidence exhibit "A," purporting to be a copy of a United States stamp for special tax certified to by the city auditor of Mandan; and, second, that it was error to tax against appellant the costs and disbursements as aforesaid.

That exhibit "A" was improperly admitted is, we think, too obvious for discussion. Several reasons might be given why such exhibit was incompetent, but it is sufficient to mention one which is that the statute (Laws 1897, chap. 189) under which a copy thereof was filed in the office of such city auditor is unconstitutional. *North Dakota ex rel. Flaherty v. Hanson*, 215 U. S. 515, 54 L. ed. 307, 30 Sup. Ct. Rep. 179. It therefore follows that such copy was not an official record in the city auditor's office, and consequently a certified copy thereof is not competent evidence of anything.

It is equally clear, however, that the admission of such exhibit was nonprejudicial. Even if admissible, the only effect that such exhibit could have had in proving the state's case was that of creating merely a prima facie presumption of defendant's guilt. But the record disclosed that it was wholly unnecessary for the state to rely upon such presumption, as direct and positive proof was furnished by the testimony of three witnesses, wholly uncontradicted, showing the fact of his guilt. In the face of this showing, we are justified in assuming that if such exhibit had not been received in evidence the result must

have been the same. Such witnesses were in no way impeached, nor their testimony in any manner discredited. The mere fact that they were each employed detectives would not be sufficient to warrant the court in disregarding their testimony. *Dickinson v. Bentley*, 80 Iowa, 482, 45 N. W. 903. See also 4 Enc. Ev. pp. 626-630 and cases cited.

Appellant's other contention is without merit. That it is permissible to tax the costs and disbursements against a defendant found guilty of contempt was expressly held by us in the recent case of *State v. Heiser*, 20 N. D. 357, 127 N. W. 72. We see no reason to depart from that holding. In addition to the authorities cited in *State v. Heiser*, see *Ex parte Whitmore*, 9 Utah, 441, 35 Pac. 524; *People ex rel. Garbutt v. Rochester & State Line R. Co.* 76 N. Y. 294, affirming 14 Hun, 371. There are cases holding that in criminal contempts no costs can be imposed, but we think such decisions were controlled by statutes differing from those in force here.

The lower court having the power to tax the costs against appellant, we are unable to say, from the record, that it arbitrarily taxed them at the sum of \$200, as contended by appellant. It must be presumed, in the absence of a contrary showing, that the trial court proceeded properly in the matter of taxing such costs. The record nowhere discloses what costs and disbursements were incurred in the contempt proceedings, nor what items were included in the total sum taxed. We are powerless, therefore, to review the action of the trial court in this particular.

The judgment appealed from is accordingly affirmed. All concur.

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## STATE OF NORTH DAKOTA v. WILLIAM WINNEY.

(128 N. W. 680.)

### **Criminal Law — Instructions — Witness — Corroboration — "Wilfully" and "Intentionally."**

1. An instruction as to the corroboration of witnesses, which states that if any witness has "wilfully testified falsely," is sufficient, and it need not be stated that such testimony must be wilfully and intentionally false.



**Criminal Law — Instructions — Corroboration of Witness — Words and Phrases — "Testimony" — "Evidence."**

2. An instruction which states that if any witness has wilfully testified falsely, etc., the jury are at liberty to wholly disregard his testimony, "except so far as the same is corroborated by other credible testimony in the case," is not erroneous by reason of the use of the word "testimony" in place of the word "evidence," as these words mean the same, as commonly understood.

**Criminal Law — Instructions — Corroboration by Facts and Circumstances.**

3. An instruction in such case is not prejudicially erroneous in not further stating that corroboration may be given to the testimony of a witness by facts and circumstances occurring at the trial.

**Criminal Law — Instructions — Nuisance — Intoxicating Liquors — Owner of Premises.**

4. Instructions pertaining to the proprietor and owner of a place where a nuisance is maintained considered, and *held* not erroneous.

**Verdict — Sufficiency of Evidence.**

5. Evidence reviewed and *held* sufficient to sustain the verdict.

Opinion filed November 19, 1910.

Appeal from the County Court of Bottineau county; *Kirk, J.*

The defendant was found guilty of keeping and maintaining a common nuisance, and appeals.

*Affirmed.*

*Bowen and Adams*, for appellant.

The instructions should have been "wilfully and intentionally." *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935; *State v. Johnson*, 14 N. D. 288, 103 N. W. 565.

"Evidence" should have been used, instead of "testimony." 16 Cyc. Law & Proc. p. 849; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346. Corroboration may be by facts and circumstances. *F. Dohman Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69.

The proprietor may not be the keeper. *State v. Kruse*, 19 N. D. 203, 124 N. W. 385; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

If verdict is unsupported by evidence, it should be set aside. *People v. Knutte*, 111 Cal. 453, 44 Pac. 166; *People v. Lum Yit*, 83 Cal.

130, 23 Pac. 228; McDonald v. State, 56 Fla. 74, 47 So. 485; Spelling, New Tr. & App. Proc. § 239.

Jury has no right to reject testimony unimpeached and not discredited. Nokken v. Avery Mfg. Co. 11 N. D. 399, 92 N. W. 487; Jones, Ev. 2d ed. § 902; State v. Woolsey, 30 Iowa, 251; State v. Fowler, 52 Iowa, 103, 2 N. W. 983; 14 Enc. Ev. p. 122.

*Andrew Miller*, Attorney General, and *J. J. Weeks*, State's Attorney, for respondent.

MORGAN, Ch. J. Defendant was convicted of unlawfully keeping a place where intoxicating liquors were sold and kept for sale, and where persons were permitted to resort for the purpose of drinking intoxicating liquors.

The errors relied on for a reversal relate to the instructions to the jury and the insufficiency of the evidence to sustain the verdict. The court instructed the jury that, if any witness had "wilfully testified falsely," they were at liberty to wholly disregard his testimony, "except so far as the same is corroborated by other credible testimony in the case." The contention so far as the first instruction is concerned is that it should have been stated, if any witness had "wilfully and intentionally testified falsely" then the jury might disregard his testimony, unless, etc.

There is no merit in this objection. In this connection the words "wilfully" and "intentionally" are synonymous. In many cases construing these words in statutes, they are held synonymous, although the word "wilfully" is in other cases construed to have a broader scope than the word "intentionally." The cases of *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935; and *State v. Johnson*, 14 N. D. 288, 103 N. W. 565, are relied on by the appellant, but none of them sustain his contention. The assignment of error here made was not contained in any point decided in those cases. In those cases the instructions complained of were that merely false testimony by a witness would warrant the jury in disregarding his entire testimony. Before that can be done the testimony must be wilfully, that is, intentionally or knowingly, false.

In respect to the other instruction, it may be passed with the remark that it is too technical for serious consideration. The words "testi-

mony" and "evidence" are often used interchangeably, although the word "evidence" comprehends something not included within the strict meaning of the word "testimony," which is evidence given orally, and it does not include documents. It would be entirely presumptuous to assume error on account of this slight omission that had practical application so far as this case is concerned. There was no documentary evidence in this case, and evidence and testimony are deemed of the same meaning, as commonly understood, and the jury undoubtedly so understood and applied the instructions.

It is also claimed that these instructions should have informed the jury that corroboration may also be given to a witness's testimony by facts and circumstances appearing at the trial. No case has been called to our attention, or found, that holds an omission to give this additional qualification to be prejudicial error. This qualification is generally given, but to hold that not giving it is prejudicially erroneous would be based on no good reason. If the testimony of the witness is corroborated by facts and circumstances appearing at the trial, it is corroborated by the evidence at the trial, as nothing but the evidence, or the manner of giving it, can be considered by the jury. If the appearance of the witness is such as to discredit him, or he has been impeached or contradicted, these are matters shown by the evidence or the giving of it. The instruction, as given, covered the same thought expressed by the usual qualification, although not so specifically expressed. In *Malinowski v. Detroit United R. Co.* 154 Mich. 104, 117 N. W. 565, and many other cases cited in *Brickwoods Sackett, Instructions to Juries*, § 344, this instruction is approved, except that the word "evidence" was used, but no further qualification was added as to corroboration by facts and circumstances occurring on the trial. In some of the states, no exception as to corroborating the evidence is given. *Burgess v. Alcorn*, 75 Kan. 735, 90 Pac. 239.

As to whether the omission to state any exception as to corroboration would be prejudicial, we do not determine in this case.

Error is predicated on the instruction which stated that defendant could be convicted although not the "owner or proprietor" of the place, if the evidence showed that he had exclusive control and management of the place while the nuisance was there maintained, and that if the jury found that the defendant "was in the exclusive con-

trol and management of the place, or that he was the proprietor thereof," then he might be found guilty. The error claimed is in instructing the jury that, if defendant had control of the place, or was the proprietor, and maintained a nuisance there, he might be found guilty. We find no error in this instruction. The jury was plainly told that the defendant must have been in control of the place before he could be found guilty. We do not think those instructions considered together are subject to the criticism that the defendant might be found guilty under them if he was the proprietor, although not the keeper of the place. As to this instruction it is urged that, under the evidence, it was shown that defendant had leased the place to another, and the jury might therefrom find that he was the owner, and, if he was the owner, he would be guilty as such, without any participation in the maintenance of the nuisance, the contention being that the word "proprietor" and the word "owner" are synonymous. Although these words are held not always to be synonymous, there is no room to support the claim that the jury might have been misled, in view of the following instruction which was given to the jury: "I charge you, gentlemen of the jury, that it is not sufficient that the state has proven, if they have so proven to your satisfaction, beyond a reasonable doubt, that the defendant owned said premises. You must further find that he exercised the control of them, and was the keeper or proprietor thereof, at the time mentioned in the information."

It is claimed that the verdict is not sustained by the evidence. The contention is that there is no evidence that the defendant was the keeper of the place. There is positive testimony that the defendant was exercising control over the place on May 30th. He was then in the place while sales were made, and demanded that the purchaser pay him for the liquor, and the money was paid to him without any claim or demand for it from anyone else. Although the testimony of the witness Nelson, on which the state relies to show that the defendant was exercising control over the place, is disputed, to some extent, by another witness, the jury has passed on this testimony, and there is no reasonable ground on which we can say that the verdict is not sustained by the evidence. There was testimony contradicting the witness Nelson, but that was for the jury to consider. They

having done so, and believed Nelson, this court cannot now say that the verdict is not sustained by the evidence.

Exception is also taken to the verdict, because the jury wholly disregarded the evidence of the only witness testifying on behalf of the defendant, although some of that evidence was uncontradicted. We have read his testimony, and all of it may be true, and still the verdict be well sustained by the other evidence. The jury, therefore, believed the testimony which referred to other dates than those referred to on defendant's behalf.

This disposes of each assignment. It follows that the judgment is affirmed. All concur.

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## STATE OF NORTH DAKOTA v. JOHN BLOOMDALE.

(128 N. W. 682.)

### **Indictment and Information — Intoxicating Liquors — Former Conviction — Sufficiency of Allegation.**

1. An information for keeping and maintaining a common nuisance contrary to § 9373, Rev. Codes 1905, as of a second offense, need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient.

### **Indictment and Information — Intoxicating Liquors — Former Conviction — Sufficiency of Allegation.**

2. If the time and place of the former conviction and the court wherein it was had are definitely stated, it will be held a good allegation of a former conviction.

### **Criminal Law — Jury — Peremptory Challenges.**

3. On a trial for the crime of keeping and maintaining a common nuisance contrary to § 9373, Rev. Codes 1905, as of a second offense, the defendant is entitled to ten peremptory challenges to jurors.

### **Criminal Law — Indictment and Information — Sufficiency — Former Conviction.**

4. The allegations of the information considered, and *held*, sufficient as to a former conviction as well as to the crime charged as of the present time.

Opinion filed November 19, 1910.

Appeal from the District Court of Sargent county; *Allen, J.*

Defendant was convicted of keeping and maintaining a common nuisance, as of a second offense, and appeals.

Reversed.

*Purcell & Divet*, for appellant.

*A. Miller*, Attorney General, *C. L. Young*, Assistant Attorney General, and *E. W. Bowen*, State's Attorney, for respondent.

MORGAN, Ch. J. The defendant was convicted of keeping and maintaining a common nuisance contrary to the provisions of chap. 65 of the Revised Codes of 1905, and was sentenced to serve one year in the penitentiary, under the verdict of the jury finding him guilty of the offense charged in the information, which was alleged therein to be a second offense. The first assignment of error by the appellant is that the information does not set forth facts sufficient to constitute a former conviction of this offense. The allegations of the information are as follows, so far as material on this appeal: "E. W. Bowen, States Attorney, . . . lays before the said court, as informant, information of the commission of a public offense, namely: That the crime of keeping and maintaining a common nuisance, second offense, has been committed; that heretofore, to wit, on the 8th day of November, in the year one thousand nine hundred and eight, and from day to day continuously from the 8th day of November, 1908, to the commencement of this action, in the county of Sargent, in the state of North Dakota, John Bloomdale, late of said county of Sargent, state of North Dakota, did commit the crime of keeping and maintaining a common nuisance, second offense, committed as follows, to wit:" (here follows the specific charge of the crime of keeping and maintaining a nuisance, concerning which no assignment of error is made. There is no allegation in the omitted parts of the information, in any way tending to show a former conviction of this offense.) After the conclusion of the charging part of the information, the following is set forth: "That the defendant was, on the 14th day of December, 1901, in the district court in and for Sargent county, North Dakota, tried and convicted and sentenced to the county jail of said county for a violation of chapter 63 of the Penal Code of the Revised Code of North Dakota, for 1899."

On the part of the appellant it is contended that this is not sufficient allegation of the former conviction of this offense. His contention is that chapter 63 of the Penal Codes of 1899 sets forth what constitutes several different and distinct offenses pertaining to the sale of intoxicating liquors, and that conviction of some of those offenses is a conviction of a crime different in character, and not in law the same offense as that set forth in this information. The allegation set forth above is specific as to the date, court, and county that the defendant was tried and sentenced in, under the former conviction. There are many authorities holding this to be sufficient. In other words, it is held that if the information specifically points out where a record of the former conviction may be found, that it is sufficient. So far as these matters are concerned, the allegations of the information do not leave the defendant in doubt or uncertainty. In this state it has been held that allegations in an information in regard to former convictions of the same or similar offenses need not describe the facts in regard to the former conviction with the same particularity as is necessary in a description of matters pertaining to the elements of the crime. It is held that, if the information briefly describes such former conviction, it is sufficient. In other words, it has been held that the matter of a former conviction is not any part or ingredient of the offense charged, but that it is a matter which pertains only to matters as to additional punishment. *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *State v. Markuson*, 7 N. D. 155, 73 N. W. 82.

There is another reason, however, for holding that the information in this case alleges a former conviction of the offense charged in the information. It contains other words which, we think, may be referred to in determining the character of the offense of which the defendant was formerly convicted. The words "second offense," which follow the allegations in the information stating that the defendant did commit the crime of keeping and maintaining a common nuisance, clearly show what the former offense was, although in the most brief language. It is a direct statement that the defendant was charged with keeping and maintaining a common nuisance in the former conviction. These words, together with the allegations setting forth the time and place of the former conviction, are sufficient to apprise the defendant of the offense that he was formerly charged with. In *State*

v. Markuson, *supra*, the court said: "The rule requiring the former conviction and judgment to be pleaded at length is entirely abrogated in these cases by our statute (Rev. Codes, § 7614,) which declares that 'it shall not be requisite to set forth in the information or affidavit or indictment the record of the former conviction, but it shall be sufficient briefly to allege such conviction.' This was done in the affidavit in this case, and the former record was introduced in evidence."

In *State v. Adams*, 64 N. H. 440, 13 Atl. 785, 7 Am. Crim. Rep. 237, the court said: "The statute merely makes a distinction in the punishment inflicted for a first and subsequent conviction. The offense is the same in either case. The offender is not subjected to increased punishment for the first violation, nor is he a second time put in jeopardy for it. The heavier punishment is for persisting in wrong by repeating the offense."

In *Reg. v. Clark*, Dears. C. C. 198, it was said: "A statement of a previous conviction does not charge an offense. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offense; they only find that he was previously convicted of it, as an historical fact."

In *Woollen & Thornton on Intoxicating Liquors*, vol. 2, § 911, this principle is laid down as follows: "In all such instances such averments must be inserted in the indictment if a greater punishment is desired, as will reasonably point out to the accused where he can find the record of the first conviction. . . . However, it is not necessary to set out with particularity the former record; it is sufficient to give such date as by its use the former conviction can be found. Thus, to give the term of the court at which the first conviction was had, and allege what the conviction was for,—as, for 'selling a quantity of intoxicating liquors,'—is sufficient."

In *State v. Small*, 64 N. H. 491, 14 Atl. 727, the court said: "The judgment need not be set forth literally; but he is entitled to a description that will enable him to find the record, to apply for a correction or reversal, and to make preparation for a trial of the question whether he is the convict." See also *State v. Robinson*, 39 Me. 150; *Dull v. People*, 4 Denio, 91.

The objection to the sufficiency of the information on this ground is not, therefore, tenable, for two reasons. The time and place of the



conviction were stated. This enabled the defendant to ascertain the crime which the state claimed that he was formerly convicted of. Further, the former conviction was charged in language that apprised the defendant that the former conviction was for the offense of keeping and maintaining a common nuisance by keeping and selling intoxicating liquors.

More liberality is allowed in allegations concerning the matter of former conviction than in reference to the ingredients of the offense for which the defendant is about to be placed on trial. Construing all the allegations of the information together, there was no substantial omission, and defendant could not have been misled as to what offense he was alleged to have been formerly convicted of.

The points raised that the information fails to state an offense, for the reason that it alleges the commission of certain unlawful acts at the present time without any direct allegation as to who committed them, cannot be sustained. There is a direct allegation that the defendant maintained a nuisance from November 8, 1906, to the commencement of the action. He is directly charged with having unlawfully kept a place, and the location of the place is then particularly described, and the particular description is followed with these words: "And in which place beer, . . . and other intoxicating liquors are kept," etc. This is a direct allegation that such keeping is done by the defendant, and refers to the commencement of the action. The point was not raised in the court below, and would not be a ground for reversal even if held good.

The defendant was allowed only six peremptory challenges to jurors. In cases where the punishment is or may be confinement in the penitentiary, ten are allowed. The point was raised at the trial, but was overruled, by inadvertence, undoubtedly, and the defendant saved an exception. The right to ten challenges in felony cases is absolute, and felony cases are, by statute, such as are punishable by imprisonment in the penitentiary. Rev. Codes, 1905, § 9967. For this reason the judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

21 N. D.—6.

SARAH MESSENGER v. THE VALLEY CITY STREET AND  
INTERURBAN RAILWAY COMPANY (a Corporation).

(32 L.R.A.(N.S.) 881, 128 N. W. 1023.)

**Common Carriers — Carrier and Passenger — When Relation Exists.**

1. The relation of carrier and passenger may exist while the passenger is entering the car or vehicle, and before he is seated therein. The fact that no ticket has been purchased does not necessarily prevent such relation arising. An implied acceptance may arise without the purchase of a ticket or other acceptance in express terms.

**Common Carrier — Street Cars — Approaches — Lights.**

2. It is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night.

**Negligence — Contributory Negligence — Question for Jury.**

3. The question of defendant's negligence and plaintiff's contributory negligence is, generally, for the jury, and, when passed upon by it, will not ordinarily be disturbed.

Opinion filed November 19, 1910.

Appeal from District Court of Barnes county; *Burke, J.*

Action for damages. Judgment for plaintiff. Defendant appeals. Affirmed.

*Herman Winterer* and *D. S. Ritchie*, for appellant.

To become a passenger, one must place himself, by contract express or implied, in carrier's conveyance, and be accepted as such.

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Note.—While the mere possession of a ticket does not always entitle one to the rights of a passenger, on the other hand, it was decided in England as long ago as 1839 (*Brien v. Bennett*, 8 Car. & P. 724) that the lack of a ticket did not necessarily deprive one of the status of a passenger; and this doctrine is now quite generally established, as shown by a review of the authorities in a note in 24 L.R.A. 521, on the question when a person who has started for a train becomes a passenger. The question as to who are passengers and when they become such is also treated in a note in 61 Am. St. Rep. 75; and the meaning of the phrase, "a passenger being transported," in a statute defining the duty and liability of carriers to passengers, is considered, with a review of the authorities, in 4 L.R.A. (N.S.) 254. The effect of signaling a car to make one a passenger is the subject of notes in 13 L.R.A.(N.S.) 283, and 25 L.R.A.(N.S.) 408.

As to measure of care which a carrier must exercise to keep its platforms and approaches safe, see note in 20 L.R.A. 520.

Bricker v. Philadelphia & R. R. Co. 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983; Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Farley v. Cincinnati, H. & D. R. Co. 47 C. C. A. 156, 108 Fed. 14; Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294; Foster v. Seattle Electric Co. 35 Wash. 177, 76 Pac. 995; Woolsey v. Chicago, B. & Q. R. Co. 39 Neb. 798, 25 L.R.A. 79, 58 N. W. 444; Hicks v. Union P. R. Co. 76 Neb. 496, 107 N. W. 798; Fremont, E. & M. Valley R. Co. v. Hagblad, 72 Neb. 773, 4 L.R.A.(N.S.) 254, 101 N. W. 1033, 106 N. W. 1041, 9 A. & E. Ann. Cas. 1096; Strong v. North Chicago Street R. Co. 116 Ill. App. 246; McFeat v. Philadelphia, W. & B. R. Co. 6 Penn. (Del.) 513, 69 Atl. 744; Hogner v. Boston Elev. R. Co. 198 Mass. 260, 15 L.R.A.(N.S.) 960, 84 N. E. 464.

Presence on platform, having paid no fare, and attempting to board a train do not make a passenger. June v. Boston & A. R. Co. 153 Mass. 79, 26 N. E. 238; Reiten v. Lake Street Elev. R. Co. 85 Ill. App. 657; Missouri, K. & T. R. Co. v. Williams, 91 Tex. 255, 40 S. W. 350, 42 S. W. 855; Merrill v. Eastern R. Co. 139 Mass. 238, 52 Am. Rep. 705, 1 N. E. 548; Bricker v. Philadelphia & R. R. Co. 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983.

Knowing the use of the plank between platform and car, and stepping into the darkness, without ordinary precaution, plaintiff was guilty of contributory negligence. Hanrahan v. Manhattan R. Co. 53 Hun, 420, 6 N. Y. Supp. 395; Graham v. Pennsylvania R. Co. 139 Pa. 149, 12 L.R.A. 293, 21 Atl. 151; Becker v. Lincoln Real Estate & Bldg. Co. 174 Mo. 246, 73 S. W. 581; Bradley v. Grand Trunk R. Co. 107 Mich. 243, 65 N. W. 102; Gulf, C. & S. F. R. Co. v. Hodges, — Tex. Civ. App. —, 24 S. W. 563; Wallace v. Wilmington & N. R. Co. 8 Houst. (Del.) 529, 18 Atl. 818; Galena & C. Union R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323; Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 386; Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; South & North Ala. R. Co. v. Schaufler, 75 Ala. 136; Clark v. Metropolitan Street R. Co. 68 App. Div. 49, 74 N. Y. Supp. 267; Missouri, K. & T. R. Co. v. Turley, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369; Little v. Hackett, 116 U. S. 371, 29 L. ed. 654, 6 Sup. Ct. Rep. 391; Johnston v. New Omaha Thomson-Houston Electric Light Co. 78 Neb. 27, 17 L.R.A.(N.S.) 435, 110

N. W. 711, 113 N. W. 526; *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N. E. 549; *Haase v. Morton*, 138 Iowa, 205, 115 N. W. 921, 16 A. & E. Ann. Cas. 350; *Anderson v. Wilmington*, 6 Penn. (Del.) 485, 70 Atl. 204; *Miller v. Chicago, St. P. M. & O. R. Co.* 135 Wis. 247, 17 L.R.A.(N.S.) 158, 128 Am. St. Rep. 1021, 115 N. W. 794.

*Page & Englert*, for respondent.

The fact that plaintiff had no ticket is immaterial. *Albin v. Chicago, R. I. & P. R. Co.* 103 Mo. App. 308, 77 S. W. 153; *McCarty v. St. Louis & Suburban R. Co.* 105 Mo. App. 596, 80 S. W. 7; *Smith v. St. Paul City R. Co.* 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Ahern v. Minneapolis Street R. Co.* 102 Minn. 435, 113 N. W. 1019; *Grimes v. Pennsylvania Co.* 36 Fed. 72; *Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *McFeat v. Philadelphia, W. & B. R. Co.* 6 Penn. (Del.) 513, 69 Atl. 744; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 165; *McDonough v. Metropolitan R. Co.* 137 Mass. 210; *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa, 264; *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388; *Texas & P. R. Co. v. Jones*, — Tex. Civ. App. —, 39 S. W. 124; *Galveston, H. & S. A. R. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204; *Gordon v. West End Street R. Co.* 175 Mass. 181, 55 N. E. 990; *Hall v. Terre Haute Electric Co.* 38 Ind. App. 43, 76 N. E. 334.

One is a passenger, when in the act of getting on the car stopping for him. *Gaffney v. St. Paul City R. Co.* 81 Minn. 459, 84 N. W. 304; *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Gordon v. West End Street R. Co.* 175 Mass. 181, 55 N. E. 990; *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 121 N. Y. 112, 24 N. E. 187.

Carrier of passengers must keep the approaches to its cars properly lighted for the safety of its passengers. *Grimes v. Pennsylvania Co.* 36 Fed. 72; *Hiatt v. Des Moines, N. & W. R. Co.* 96 Iowa, 169, 64 N. W. 766; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361; 6 Cyc. Law & Proc. pp. 605-609; *Chicago, R. I. & P.*

R. Co. v. Stepp, 22 L.R.A.(N.S.) 350, 90 C. C. A. 431, 164 Fed. 785.

Whether plaintiff was exercising care, or defendant was negligent, were matters for the jury. Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Chicago & J. Electric R. Co. v. Wanic, 230 Ill. 530, 15 L.R.A.(N.S.) 1167, 82 N. E. 821; Butler v. Glens Falls, S. H. & Ft. E. Street R. Co. 121 N. Y. 112, 24 N. E. 187.

MORGAN, Ch. J. On the 3d day of December, 1906, the plaintiff was injured while attempting to board a street car belonging to the defendant company. The complaint alleges that the injury was caused by the failure of the defendant to cause the approach to said street car to be properly lighted, and its failure to have guards or rails placed at such approach. The defendant runs a street car line in Valley City, and runs its cars so as to make connections with all passenger trains of the "Soo" Railway Company at the depot of said railway company. At the depot or station the railway track is used by the street railway company. Except as to this distance at the station, the street railway company maintains its own tracks. The street railway company carries passengers to and from said depot, and the car remains at the depot until the arrival of the incoming passenger trains, and until the incoming passengers enter the street car. The approach from the depot platform to the car is made on a plank 4 feet long and about 2 feet wide, resting on the depot platform and the steps of the car, about 18 inches from the ground. The space between the depot platform and the car steps is about 30 inches.

At about 8:00 o'clock on the evening of said 3d day of December, plaintiff was a passenger from the South, on said railway, and left the train at Valley City, and immediately proceeded towards the street car. She had been a passenger on the street car at prior times, and knew where it stood. She had stepped on the plank with one foot, and was about to take another step thereon when she fell to the ground and was injured. Whether she slipped, or failed to step on the plank, does not clearly appear.

At this time other passengers were entering the car, and some were in the car waiting for it to start. It started in a few minutes thereafter. She was not directed to the car at that time by any one of the servants or employees of the street car company, and was actually escorted to the car by her son, who carried her baggage. No servants or employees of the company were at the car when she attempted to enter it. The lights had not been turned on in the car, but it was lighted to some extent by a lantern placed on the inside of the car.

She brought this action, and bases her right to recover upon the alleged negligence of the company in failing to provide lights at the place where the street car is entered, and for its failure to provide a proper railing or guard where the plank is placed. The defendant, in its answer, alleges that the relation of carrier and passenger did not exist between the plaintiff and the defendant at the time of the injury, and that if she was a passenger at that time her injury was caused through her own contributory negligence. The jury found a verdict in her favor for the sum of \$200. The defendant has appealed from a judgment entered upon that verdict, and relies upon these two assignments for a reversal of the same.

The appellant's contention is that the relation of carrier and passenger is not created as a matter of law until the passenger enters some conveyance by virtue of a contract express or implied, and has been expressly or impliedly received as a passenger by the servants of the carrier. The plaintiff had not purchased a ticket for the trip, and there was no place at the station for the purchase of tickets, and the custom prevails to pay the fare to the conductor while on the car. There is no custom shown that the servants of the street railway company were to give any actual permission or consent before the passengers could rightfully enter the car. The doors of the car were not locked, and the car was lighted as before stated. From these facts it is to be determined whether the plaintiff was a passenger as a matter of law when the injury occurred.

It is beyond question that she stepped upon the plank intending to become a passenger, and that the car started on its trip in a very short time thereafter. When injured she was using one of the appliances provided by the company for entering the car. The contention that the plaintiff was not a passenger for the reason that she had not paid

fare or bought a ticket when injured cannot be upheld. The car was at the station to receive passengers, and that fact may be deemed an invitation for passengers to enter, under the circumstances of this case. There is no dispute in the evidence as to the circumstances under which she entered the car, and from such circumstances we think she became a passenger as a matter of law, and defendant owed her the duty to provide safe approaches to the car. The plank had been placed there for use by those desiring to enter, and, as a matter of law, this should be deemed an invitation for those wishing to enter as passengers to do so. The company, having impliedly invited passengers to enter the car without payment of fare, impliedly accepts those entering pursuant to such invitation for the purpose and with the intention of being carried as passengers. No formal acceptance is necessary, nor payment of fare previous to entering. The acts of the officers in permitting passengers to use the appliances for entering provided by the company, as in this case, just before the car started, without any warning not to do so, or any objection, should be presumed to be acquiesced in by the company where no rule of the company is violated. The following statement of the rule is well sustained by the authorities: "The relation of carrier and passenger commences when a person with the good-faith intention of taking passage and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers." 6 Cyc. Law & Proc. p. 536, and cases cited.

"The previous purchase of a ticket is not essential to the beginning of the relation of passenger and carrier, where it is not by the rules or known usage of the company made a condition precedent to the acceptance of the passenger. If there is an intent to pay fare, or to do whatever else is required to entitle the person to transportation, he becomes a passenger by implied acceptance, although his fare has not yet been paid or his ticket called for." 6 Cyc. Law & Proc. p. 537, and cases cited.

In *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 121 N. Y. 112, 24 N. E. 187, the court said: "It does not seem reasonable to assume, as a matter of law, that a person who, in an orderly way, attempts to enter a street car as a passenger, is to be regarded a trespasser until

a special contract has been made with the conductor based upon the payment of the required fare."

In *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388, the court said: The "party coming to the railroad station with the intention of taking . . . [its] next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger it is not necessary that he should have purchased his ticket."

The question of defendant's negligence is not seriously denied. That question was submitted to the jury. Having found for the plaintiff under proper instructions, there is no legal ground or reason based upon the evidence for disturbing the verdict. The defendant, therefore, must be held to have violated a legal obligation devolving upon it as a carrier, to provide the approaches to the car with proper light for the safety of those about to enter it. See 6 Cyc. Law & Proc. p. 609, and cases cited.

Defendant insists that plaintiff was guilty of such contributory negligence as to bar her right to any recovery. Its claim is based on the alleged fact that the plaintiff entered the car without any invitation, and before the servants of the defendant gave permission to enter the car, and before the time when passengers could properly enter it; that she unnecessarily attempted to walk on the plank in the dark, knowing the danger. It is sufficient to say on this subject that the jury was correctly instructed on the law of contributory negligence, and found in plaintiff's favor. We think that this verdict finally settles the question as to the plaintiff's contributory negligence, under the evidence. There is no warrant for saying, as a matter of law, that there was contributory negligence fatal to a recovery.

There is a dispute as to whether there was a light at or near the plank. Plaintiff testifies that it was dark, and that she could just see the plank. Defendant testified that it was not dark, and that surrounding lights threw some light on the location. The jury has passed on the question of the contributory negligence of the plaintiff. The verdict is sustained, and no reason appears for disturbing it. That the questions of negligence and contributory negligence are for the jury, ordinarily, has frequently been held by this court, and in the



recent cases of *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960.

It follows that the order appealed from should be affirmed, and it is so ordered. All concur.

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## F. W. McLEAN v. NEWS PUBLISHING COMPANY.

(129 N. W. 93.)

### Master and Servant — Action for Breach of Contract of Employment — Admissibility of Evidence.

1. Plaintiff entered into the employment of defendant under a contract whereby, in consideration of a salary of \$1,800 per year and one half of the net profits of the business, plaintiff was to assume the management of defendant's business at Fargo, which consisted in the printing, publishing, and circulating of the newspapers published by defendant. Such contract was to continue for six years. At the time of entering into such contract, plaintiff was a resident of Langdon, this state, engaged in the general practice of law, his business netting him \$2,500 per year. Immediately upon entering into the contract, plaintiff abandoned his law business at Langdon, and moved his family to the city of Fargo, where his duties under the contract were to be performed. Thereupon he entered upon the discharge of his duties under the contract, and faithfully performed the same for the period of nearly three months, at which time it is alleged that defendant wrongfully and without cause discharged the plaintiff.

In an action to recover damages for such wrongful discharge, plaintiff offered to prove his reasonable expenses in moving from Langdon to Fargo, and also what his services were worth, and, as a circumstance tending to prove the latter fact, he offered to show his earning capacity at Langdon at the time he entered into the contract, which offer was rejected. *Held*, error, for reasons stated in the opinion.

In view of the fact that a portion of plaintiff's compensation under the contract was to be a share of the net profits, and such prospective profits being too uncertain and conjectural to be susceptible of approximate measurement, the only proper rule for measuring plaintiff's damage to be applied is that

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**Note.**—The general question of measure of damages for servant's wrongful discharge is considered in a note in 43 Am. Dec. 209.

he may recover the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.

**Master and Servant — Wrongful Discharge of Servant — Damages — Estoppel.**

2. It does not lie in the mouth of the party who has voluntarily and wrongfully put an end to a contract of employment, to say that the party injured has not been damaged, at least, to the amount of what he has been induced fairly and in good faith to lay out and expend, including his own services. He is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

Opinion filed November 19, 1910.

Appeal from District Court, Cass county; *Chas. A. Pollock, J.*

Action by Fred W. McLean against the News Publishing Company. There was a directed verdict for plaintiff granting inadequate relief, and he appeals from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

Reversed, and a new trial granted.

*M. A. Hildreth*, for appellant.

FISK, J. This litigation grows out of an alleged breach by defendant, the News Publishing Company, of the following contract:

"This agreement entered into this 31st day of December, 1908, by and between the News Publishing Company, a corporation, of Fargo, North Dakota, party of the first part, and F. W. McLean, of Langdon, North Dakota, party of the second part.

"Witnesseth, That the party of the first part has this day employed the party of the second part for a period of six years to act as its business manager in printing, publishing, and circulating the various newspapers published by the party of the first part, and hereby agrees to pay to said party of the second part a yearly salary of eighteen hundred dollars, to be paid in monthly instalments of one hundred fifty dollars per month.

"The party of the first part hereby agrees, after the debts of the corporation are paid, to set aside at the close of each business year fifty per cent of the profits earned in the business during the current year, after deducting operating expenses, and to invest the same in capital stock of the company at its par value and to issue paid up capital

stock in the amount of the sum so set aside for that year or buy therewith of the company at its par value for the party of the second part.

"The party of the second part hereby contracts to render to said party of the first part skilful services in the capacity in which he is employed, and agrees to devote his entire time and ability to the management of the business of the party of the first part, hereby committed to his charge, and in the management of said business agrees to conform to the requirements of the articles of incorporation and the by-laws of the said party of the first part.

"The board of directors of the party of the first part shall determine and control the policy of the paper, but, subject to such control, the said party of the second part shall have complete charge of the said business of the party of the first part, and shall have full authority to carry out the policy of the paper as outlined by the board of directors, and shall be accountable to the said board alone for the acts done by him in that behalf.

"The party of the first part hereby agrees to cause the capital stock to be increased to \$50,000, and agrees to provide a guaranty fund of at least \$35,000 to finance the business of said party of the first part for a period of three years.

"The said party of the first part further agrees that the party of the second part shall have the right, so far as it can be given and assured to him by the board of directors, to purchase a majority of the capital stock of the party of the first part at the par value thereof at the time of purchase, and agrees to assist said party of the second part in securing an option on a majority of said stock.

"It is further agreed that either of the parties hereto reserves the right to terminate this contract at any time upon the failure or refusal of either party to perform any of its or his agreements herein contained.

"In witness whereof, the said corporation has caused these presents to be executed in its corporate name by its president and secretary, and its corporate seal to be hereunto affixed this 31st day of December, 1908."

Among other things the complaint, in substance, alleges: That pursuant to the terms of said contract, plaintiff surrendered up his business as an attorney at law at Langdon, and entered into the service.

of the defendant as its editor and manager on January 9, 1909, and continued to render and perform services thereunder in conformity with the provisions of such contract up to and including March 29, 1909, at which time, without fault on his part, defendant wrongfully and without cause discharged plaintiff, canceled said contract, and refused on its part to keep and perform the covenants therein agreed to be performed. It is alleged in the complaint, and admitted in the answer, that a balance of \$185.15 was due plaintiff on said date on account of stipulated salary to be paid by the contract. The complaint further alleges: That by reason of such contract plaintiff was induced and did abandon his law business at Langdon, which was netting him an income of \$2,500 a year, and incurred the expense of moving his family from Langdon to Fargo at a necessary expense of from \$300 to \$350, and he demands judgment for the sum of \$185.15, and also for damages in the sum of \$2,850 on account of the breach of such contract by defendant.

By its answer defendant admits the execution of the contract aforesaid, and that plaintiff surrendered up his business as an attorney at law at Langdon, moved his family to Fargo, and entered into the service of the defendant under such contract as the manager of said publishing company, and that he remained in such capacity from January 9 to March 29, 1909, but such answer, in other respects, places in issue the allegations of the complaint.

At the trial plaintiff made the following offer of proof: "Plaintiff offers to prove by competent testimony that he entered into the contract—Exhibit A—in good faith, was at all times ready and willing to keep and perform it, and entered upon the performance of the contract in January, 1909; that in March, 1909, the defendant wilfully broke it, dispossessed him from the management of the business, and made a lease to third parties, and installed them in the operation of the business. The plaintiff is not in position to prove whether there be any profits or not arising from said business, because the lease was made between the defendant and third parties, of which he has no knowledge; that he was earning from his law business at Langdon the net sum of \$250 a month, and that it was known at the time by the defendant that he was earning approximately that; that he had had experience as a newspaper man, had been a journalistic writer,

and that it was an inducement on his part to enter into the contract, under the terms which he did, to leave the law business at Langdon and come to Fargo to take charge of the management of said defendant's business; that he incurred an expense in moving himself and family to the city of Fargo of from \$300 to \$350; that he was ready and willing at all times to perform the said contract and carry out its terms in good faith; that there was no reason or excuse whatsoever for the violation of said contract upon the part of defendant, and that defendant pretended on its records to pass a resolution which was false and known to be false at the time, for the purpose of getting rid of the plaintiff and his rights and interest under said contract; that between the 17th day of March and the present time the profits arising from said business are uncertain and incapable of being established, because defendants have a secret agreement with the lessee, whose terms are not known to plaintiff, or whether there are profits arising from the management of said business; that he had to give up his law business; and come to the city of Fargo by reason of entering into said contract; that he entered into said contract, because of the fact that he was induced to believe that defendant would carry out the terms of its agreement in its entirety; that he severed his partnership relations with Judge Cleary, at Langdon, closed his partnership business, and abandoned his law business, and has not since then practised law either in Langdon or elsewhere; that after the violation of said contract by defendant, and after plaintiff was refused permission to carry on said business, he made an effort to get into the same business or other employment of like character, and has been unable to do so."

This offer of proof was objected to by defendant's counsel, upon the ground that the testimony offered was incompetent, irrelevant, and immaterial, which objection was sustained and plaintiff excepted. Thereupon the court instructed the jury to find a verdict for the plaintiff for \$185.15, with interest from March 17, 1909, at 7 per cent. Thereafter a motion for judgment notwithstanding the verdict or for a new trial was made by plaintiff and denied, and the appeal is from the order denying such motion.

The assignments of error present for our determination the question as to the proper measure of damages for the breach of the con-

tract. The proper rule to be adopted for measuring plaintiff's damage is, we confess, not entirely clear, and the question has given us considerable difficulty. The general rule is prescribed by our Code as follows: "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Rev. Codes 1905, § 6563.

Appellant does not seek to recover any damage for prospective profits under the contract, but expressly concedes that such damages are too uncertain and speculative to be capable of measurement. He, however, insists that he is entitled to recover the damages suffered by him in abandoning his established law business at Langdon and in incurring certain expenses in moving to Fargo necessitated by the contract in question.

The only sum which he was permitted to recover in the trial court is a balance conceded to be due him under the stipulation in the contract, whereby he was to receive, in addition to a share of the profits, \$1,800 per year. In other words, the logical effect of the ruling complained of is that if the stipulation aforesaid were not in the contract, but plaintiff was merely to receive for his services in the management of such business a certain share of the net profits thereof, he could recover nothing on account of defendant's wilful and wrongful breach of the contract. To deny him any redress under the facts which he offered to prove would, we think, be a reproach upon the law. It must be conceded that the small recovery permitted by the court below is in no sense an adequate compensation for the detriment caused by the breach of the contract. It is merely a portion of the compensation stipulated for in the contract. For all we know, the stipulated amount to be paid plaintiff may be a minor portion only of the contemplated compensation which he was to receive under the contract. The share which he was to receive in the net profits of the business, perhaps, may have formed the chief inducement to the contract.

Just what theory plaintiff's counsel proceeded on in bringing the action, and in making the offers of proof at the trial, is not plain.

Plaintiff had an election to treat the contract as rescinded on being discharged, and to recover on a *quantum meruit* for the services actually rendered, or he might sue on the contract and recover damages, including the wages earned, to the amount of the actual loss sustained, in so far as the same is susceptible of proof. He cannot, however, avail himself of both of these remedies. 3 Sutherland, Damages, 3d ed. § 692. As we construe the complaint, plaintiff has elected to sue on the latter theory. What, then, is the true measure of defendant's liability? If the only stipulated compensation was a certain designated salary, the answer would not be difficult. 3 Sutherland, Damages, § 692; 13 Cyc. Law & Proc. pp. 155-161. The learned author of Sutherland on Damages says: "The recovery in such a case should be the fair and reasonable present value of the contract, or, as more fully stated in a later case, the amount which would have been earned up to the time of the trial but for the master's wrongful act, and the present worth of what the servant would be able to earn in the future so long as he would, in the ordinary course of events, be able to perform the stipulated service, less any sums he would be able to earn in other employments." The fact that a portion of the stipulated compensation is prospective profits, which are incapable of being even approximated, requires the application of a different rule.

In *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, Mr. Justice Bradley announces a rule which we deem applicable to the case at bar, as follows: "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least.

to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services). . . . The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

In *Skinner v. Tinker*, 34 Barb. 334, plaintiff sued to recover damages for the breach of a contract for the formation of a partnership. Plaintiff, a dentist at Brooklyn, and defendant, a dentist at Havana, Cuba, entered into a contract to engage in the dentistry business at Havana. The agreement was silent regarding the duration of the partnership. Plaintiff sold his business at Brooklyn, and made preparations for carrying out his agreement. Afterwards he received a letter from defendant, declining to carry out the contract. Plaintiff claimed that he had suffered large damages by reason of the defendant's violation of the agreement. At the trial he proved such agreement, the sale of his business at Brooklyn, the defendant's refusal to perform, his readiness and offer to perform, and the damages plaintiff had sustained by reason of defendant's violation of the contract. Prospective damages were not permitted, but plaintiff's recovery in the sum of \$4,000, as damages up to the time the contract was broken by defendant, was sustained.

In *Johnson v. Arnold*, 2 Cush. 46, which was an action to recover damages for the breach of special contract by which defendant agreed to furnish and keep the plaintiff supplied with a stock of goods for carrying on business at defendant's store in another state, and plaintiff undertook to carry it on for a share of the profits for a given term, it was held competent, in estimating the damages, to allow plaintiff compensation for the loss of his time, and for the expenses of removing his family to and from the place where the business was to be carried on. To the same effect, see *Moore v. Mountcastle*, 72 Mo. 605, where plaintiff was allowed to recover for loss of time and expense in going to perform a contract. This same doctrine is affirmed in *Woodbury v. Jones*, 44 N. H. 206. In *Wilson Sewing Mach. Co. v. Sloan*, 50 Iowa, 367, it was held that the measure of damages for the breach of a contract for the exclusive sale of an article of merchandise is the value of the agent's time during the period he was em-



ployed under the contract, with reasonable expenses added and diminished by the sum actually earned. In *Meylert v. Gas Consumers' Benefit Co.* 26 Abb. N. C. 262, 14 N. Y. Supp. 148, it was held that a sole agent for the sale of a patented article within a specified territory, who had abandoned his profession as a physician, and devoted his entire time to the business of the agency, in reliance on his contract with the manufacturers, is entitled to recover from them for their total breach of the contract to furnish him with the articles, not only the amounts which he actually expended in the business of the agency, but also the earnings which the evidence reasonably establishes he otherwise would have made from his profession. To the same effect, see *Howe Mach. Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735.

We think the plaintiff was entitled to recover as an element of his damage what his time was reasonably worth up to the time of the breach of the contract, less, of course, the amount received by him, and that the offered proof of his earning capacity, at the time he entered into the contract, in his law business at Langdon tended to furnish some proof as to such value; hence it was error to deny this offer of proof. We also think plaintiff was entitled to recover the actual and reasonable expense incurred by him in moving to Fargo, as such expense was fairly within the contemplation of the parties at the time the contract was entered into. It was therefore prejudicial error to deny plaintiff's offer of such proof.

The order appealed from is reversed, and a new trial granted, appellant to recover his costs of the appeal. All concur.

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GOLDEN VALLEY LAND & CATTLE COMPANY v. JOHN  
JOHNSTONE.

(128 N. W. 690.)

**Demurrer — Misjoinder — Demand for Relief.**

1. In an action brought primarily for the purpose of determining adverse claims to real property, a demurrer to the complaint stating as the only ground for demurrer that several causes of action are improperly united cannot be sustained when the facts stated in the complaint only constitute one cause of  
21 N. D.—7.

action, although the demands for relief may be inconsistent, or applicable to different causes of action which could not be properly united. For the purpose of determining whether demurrer will lie in such case, the demands for relief form no part of the cause of action.

**Appeal and Error — Demurrer — Misjoinder — Objections in Court Below.**

2. The complaint was demurred to on the ground only that it improperly united several causes of action. It is contended in this court on appeal from an order overruling such demurrer, that the complaint does not state a cause of action, and that therefore the order overruling the demurrer should be reversed.

*Held*, that this question is not before this court.

Opinion filed November 23, 1910.

Appeal from District Court of Billings county; *Crawford, J.*

From an order overruling defendant's demurrer to plaintiff's complaint, defendant appeals.

Affirmed.

*Heffron & Baird* and *J. A. Miller*, for appellant.

In the statutory action to determine adverse claims, there can be only the recoveries specified in the statute. *Chandler v. Hanna*, 73 Ala. 390; *Roberts v. Landecker*, 9 Cal. 262; *French v. Willer*, 126 Ill. 611, 2 L.R.A. 717, 9 Am. St. Rep. 651, 18 N. E. 811; *McKinney v. Monongahela Nav. Co.* 14 Pa. 65, 53 Am. Dec. 517; 1 Cyc. Law & Proc. p. 707, note 95.

A complaint that states no cause of action cannot support a judgment. *Harmon v. Ashmead*, 60 Cal. 439; *Rogers v. Shannon*, 52 Cal. 99; *Pittman v. Myrick*, 16 Fla. 692; *Curtis v. Cutler*, 7 Neb. 315; *Weidner v. Rankin*, 26 Ohio St. 522; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Rayner v. Clark*, 7 Barb. 581.

The point can be raised at any stage of the action, and in the appellate court for the first time. *Parker v. Bond*, 5 Mont. 1, 1 Pac. 209; *Territory ex rel. Blake v. Virginia Road Co.* 2 Mont. 96; *Macintosh v. Renton*, 2 Wash. Terr. 121, 3 Pac. 830; *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693; *Nance v. People*, 25 Colo. 252, 54 Pac. 631; *Sage v. Plattsmouth*, 48 Neb. 558, 67 N. W. 455; *Guthrie v. Nix*, 3 Okla. 136, 41 Pac. 343; *Holt v. Pearson*, 12 Utah, 63, 41 Pac. 560; *Mack v. Salem*, 6 Or. 276.

*Purcell & Divet* and *MacFarlane & Murtha*, for respondent.

Objection to pleading will not be sustained if first made on appeal. *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213; *Harshman v. Northern P. R. Co.* 14 N. D. 69, 103 N. W. 412; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057; *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; *Fbley v. Dwyer*, 122 Mich. 587, 81 N. W. 569; *Nelson v. Modern Brotherhood*, 78 Neb. 429, 110 N. W. 1008; *Reeves v. Howard*, 118 Iowa, 121, 91 N. W. 896; *Insurance Co. of N. A. v. Bonner*, 24 Colo. 220, 49 Pac. 366; *Tobias v. Morris*, 126 Ala. 535, 28 So. 517; *Edward Malley Co. v. Londoner*, 41 Colo. 436, 93 Pac. 488; *United States Mineral Co. v. Camden*, 106 Va. 663, 117 Am. St. Rep. 1028, 56 S. E. 561.

Demurrer for misjoinder must point out the misjoined causes. *Rev. Codes 1905*, § 6855; *Cowan v. Motley*, 125 Ala. 369, 28 So. 70; *Healy v. Visalia & T. R. Co.* 101 Cal. 585, 36 Pac. 125; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461; *Owsley v. Montgomery & W. P. R. Co.* 37 Ala. 560; *Green v. Taney*, 7 Col. 278, 3 Pac. 423; *Central R. Co. v. Joseph*, 125 Ala. 313, 28 So. 35; *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20; *Baker v. Hawkins*, 29 Wis. 576; *Gardner v. Fisher*, 87 Ind. 369; *Owen v. Oviatt*, 4 Utah, 95, 6 Pac. 527.

Pleading must state two or more good causes of action to be demurrable for misjoinder. *Keens v. Gaslin*, 24 Neb. 310, 38 N. W. 797; 31 Cyc. Law & Proc. p. 292; *Boyd v. Mutual Fire Asso.* 116 Wis. 155, 61 L.R.A. 918, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171; *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; *Colstrum v. Minneapolis & St. L. R. Co.* 31 Minn. 367, 18 N. W. 94; *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721.

If more than one cause of action is stated, they are connected with the subject of the action. *Telulah Paper Co. v. Patten Paper Co.* 132 Wis. 425, 112 N. W. 522; *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 112 N. W. 1097; *Reed v. Bernstein*, 103 Minn. 66, 114 N. W. 261; *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72; *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90; *Armstrong v. Hinds*, 8 Minn. 254, Gil. 221.

Different or inconsistent demands for relief have no bearing on whether two causes of action are stated. 1 Abbott, Trial Brief, 746,

et seq.; *San Diego Water Co. v. San Diego Flume Co.* 108 Cal. 549, 29 L.R.A. 839, 41 Pac. 495; *Florence Gas, Electric Light & P. Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *McGraw v. Woods*, 96 Fed. 56.

SPALDING, J. This appeal is from an order of the district court of Billings county, overruling defendant's demurrer to the plaintiff's complaint, because several causes of action are improperly united. The complaint is primarily to determine adverse claims to real property, under the provisions of chapter 31, Rev. Codes 1905, and the objections of the appellant are directed not toward the body of the complaint, which states the facts on which the plaintiff relies for recovery, but toward the several demands for relief or money judgment, and he argues the appeal upon the theory that such demands enter into or constitute several causes of action, which cannot be united.

A somewhat similar complaint has just been passed upon in another action, in which the opinion has just been filed, and where the order overruling the demurrer was sustained. *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687. It is not contended that the facts alleged in the complaint constitute more than one primary right and one wrong involving that right, and if that be correct it is immaterial, for the purpose of determining this appeal, how many kinds of relief the plaintiff may claim to be entitled to or ask to recover, for the relief in such case is no part of the cause of action. Plaintiff has other adequate remedies if improper or inconsistent forms of relief are demanded. See *Pom. Code Remedies*, §§ 453-455. For these reasons the demurrer was properly overruled.

Appellant further contends, however, that the complaint does not state a cause of action, and that objections on that ground may be made at any stage of the litigation. This objection rests upon the failure of the plaintiff in setting out his title or interest in the land to which title is sought to be quieted in its complaint. The complaint alleges that on the 18th of January, 1906, and long prior thereto, plaintiff had an estate and interest in, and was entitled to, the possession of the land described, and that the nature of such right and estate consisted in a purchase of such land under a contract for a deed by the plaintiff, and the possession of plaintiff, and its right to a warranty deed upon making certain deferred payments. It does not

allege that the plaintiff had any estate or interest or title in the land when the action was commenced. It is claimed on argument, and is doubtless a fact, that this was a clerical omission in transcribing the complaint, by plaintiff's stenographer. This, however, is immaterial, and we need not determine whether the allegation in the complaint is adequate. It is sufficient to say that the attention of the trial court was not called to it, that the demurrer did not cover it, and that this appeal is only from an order overruling the demurrer on the ground that several causes of action were improperly united. It follows that the question of the insufficiency of the complaint was not before the trial court, and no ruling of the trial court on that question is brought before us by this appeal. This court is only called upon to pass upon the order appealed from. It is not within its province to pass upon something which was not decided by the lower court, or upon something which it may be imagined that court would have decided had it been before it. We therefore decline to pass upon this question. The suggestion offered to the district court in *Randall v. Johnstone*, *supra*, is applicable in this case.

The order of the District Court is affirmed.

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## GOLDEN VALLEY LAND AND CATTLE COMPANY v. JOHN JOHNSTONE.

(128 N. W. 691.)

### **Vendor and Purchaser — Forfeiture of Contract — Right to Crops after Forfeiture — Election of Remedies — Action to Determine Adverse Claims.**

1. Without deciding whether § 5710, Rev. Codes 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, Rev. Codes 1905, which provides that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, have any application

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**Note.**—As to measure of damages generally against vendee for refusing to perform his contract to purchase, see note in 67 Am. Dec. 275. The question of measure of damages for breach of executory contract is the subject of a note in 42 Am. Dec. 48.

to a crop raised on land and severed therefrom by one who retains possession thereof after default by him in the terms of an executory contract of purchase, and after the statutory notice has been served on him of the forfeiture and cancelation of such contract, it is *held*, where the vendor has never been in possession of such land, and two years before the crop in controversy was severed therefrom had commenced an action to determine adverse claims thereto, in which the only money judgment demanded was for the value of the use and occupation thereof, and he has remained silent until after the harvesting of two crops,—that he has thereby elected to stand upon his right to recover for the use and occupation, and has waived his right, if any, to recover the value of the crop so raised and severed by the vendee.

**Adverse Claims — Vendor and Purchaser — Contract — Crops after Forfeiture.**

2. In an action to determine adverse claims to real estate under § 31, Rev. Codes, 1905, brought by the vendor on an executory contract for the sale of land, the plaintiff cannot recover both for the value of the crop raised after forfeiture of the contract by the vendee, and for the use and occupation of the land on which the crop was raised, after severance of such crop from the land.

**Adverse Claims — Action — Scope of Recovery — Money Judgment — Use and Occupation.**

3. Sections 7520 and 7534, Rev. Codes 1905, define the nature of the recovery, which may be had by plaintiff in actions to determine adverse claims to real property, and a plaintiff who has proceeded under the provisions of said chapter can only recover a money judgment for the value of the use and occupation, except when he shows damages by waste or removal of the property from the premises.

**Question Undecided — Statutory Construction.**

4. It is held that under the facts of this case it is unnecessary to decide whether § 4752, Rev. Codes 1905, which provides that the owner of a thing owns all its products and accessions, establishes title to grain raised on land and severed therefrom by one holding possession thereof after forfeiture of an executory contract of purchase, in the vendor as against his vendee, when such vendor has never been in possession of the land, but a review of the authorities discloses them overwhelmingly in favor of ownership in the grower of the crop.

**Vendor and Purchaser — Breach of Contract — Liens on Crops — Use and Occupation.**

5. The vendor, under an executory contract for the sale of land, who is not and never has been in possession thereof, under the facts disclosed in this case and set forth in the opinion, has no lien upon the crop raised and severed by the vendee in possession, as security for the value of the use and occupation.

**Vendor and Purchaser — Forfeiture of Contract — Recovery of Severed Crops.**

6. It is *held*, that the vendor, under the facts, circumstances, and pleadings above referred to, cannot have a receiver to take possession of and conserve the crop so raised, after its severance, for the purpose of subjecting it to his claim for the value of the use and occupation of the premises after forfeiture by the vendee of his contract of purchase.

Opinion filed November 23, 1910.

Appeal from the District Court of Billings county; *Crawford, J.*

Action to determine adverse claims to real property. From an order denying plaintiff's application for the appointment of a receiver *pendente lite*, plaintiff appeals.

*Affirmed.*

*Purcell & Divet* and *MacFarlane & Murtha*, for appellant.

Failure of one party to perform authorizes the other to abandon the contract. *Stanford v. McGill*, 6 N. D. 543, 38 L.R.A. 760, 72 N. W. 938; *Giltner v. Rayl*, 93 Iowa, 16, 61 N. W. 225.

So an attempted modification. *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385; *Crabtree v. St. Paul Opera-House Co.* 39 Fed. 746; *Ortman v. Weaver*, 11 Fed. 358; 3 Page, Contr. §§ 1436-1443; *Johnson Forge Co. v. Leonard*, 3 Penn. (Del.) 342, 94 Am. St. Rep. 86; *Stephenson v. Cady*, 117 Mass. 6; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

Defendant is a trustee in possession of lands, liable to account for rents and profits. Rev. Codes, 1905, §§ 5710, 5711; *Stebbins v. Demorest*, 138 Mich. 297, 101 N. W. 528; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347, 26 N.E. 109; 2 Story, Eq. Jur. §§ 1254-1266; *Bullard & T. Tr.* p. 113; *Crooks v. Whitford*, 40 Mich. 599; 3 Pom. Eq. Jur. §§ 1051-1053; *American Soda Fountain Co. v. Futrall*, 73 Ark. 464, 108 Am. St. Rep. 64, 84 S. W. 505; *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479; *Rieper v. Rieper*, 79 Mo. 352; *Boylan v. Deinzer*, 45 N. J. Eq. 485, 18 Atl. 119; *Huntley v. Denny*, 65 Vt. 185, 26 Atl. 486; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666.

*Heffron & Baird* and *J. A. Miller*, for respondent.

Receiver may be appointed to hold crops in ejectment. *Ireland*

v. Nichols, 37 How. Pr. 222; American Freehold Land Mortg. Co. v. Turner, 95 Ala. 272, 11 So. 211; Hendrix v. American Freehold Land Mortg. Co. 95 Ala. 313, 11 So. 213.

Inability to attach is a reason for receivership. *Bitting v. Ten Eyck*, 85 Ind. 357; *Ulman v. Clark*, 75 Fed. 868; *Whitney v. Buckman*, 26 Cal. 448, 10 Mor. Min. Rep. 428; *Flagler v. Blunt*, 32 N. J. Eq. 518; *People v. New York*, 10 Abb. Pr. 111.

Party cannot recover for use and occupation of land and the crops too. Rev. Codes, 1905, § 7520; *Aultman & T. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406.

Where a trespasser sows a crop and harvests it, he can hold it against the landowner. *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Adams v. Leip*, 71 Mo. 597; *Jenkins v. McCoy*, 50 Mo. 348; *Harris v. Turner*, 46 Mo. 438; *Brothers v. Hurdle*, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400; *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. 394; *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *Johnston v. Fish*, 105 Cal. 420, 45 Am. St. Rep. 53, 38 Pac. 979; *Stockwell v. Phelps*, 34 N. Y. 364, 90 Am. Dec. 710; *Phillips v. Keysaw*, 7 Okla. 674, 56 Pac. 695; *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; *Woodcock v. Carlson*, 41 Minn. 542, 43 N. W. 479; *Aultman & T. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756.

Crops severed are personal property. *Phillips v. Keysaw*, 7 Okla. 674, 56 Pac. 695.

SPALDING, J. This case is here on appeal from an order denying plaintiff's application for the appointment of a receiver to take charge of and conserve a crop of wheat grown upon section 13 in township 138 N. of range 106 W., in Billings county, North Dakota, during the season of 1909. The action was brought in August, 1907, and the original complaint is substantially in the statutory form for the determination of adverse claims to real estate. The relief demanded is the customary relief sought in such actions and that plaintiff recover \$500 as the value of the use and occupation of the premises. The



answer denies most of the allegations of the complaint, and sets forth a contract, wherein plaintiff agreed, on the 18th of January, 1906, to sell and convey to defendant, by warranty deed, upon the performance by defendant of his part of the agreement, said section 13. The consideration which defendant agreed to pay was \$8,000, and it was to be paid by conveying by warranty deed, free from encumbrance, certain property in Sioux Falls, South Dakota, at a consideration of \$4,200, to be deeded to plaintiff on its delivering to defendant executory contracts covering said section 13 showing certain balances due thereon. The first act to be done by the plaintiff was to furnish the defendant executory contracts which it held for such land, it not then having the title. The papers were to be exchanged on or before April, 1906. It is then alleged in the answer that the defendant then was, and had been at all times, ready and willing to perform his part of such contract, but that plaintiff had failed and neglected to perform his part thereof, and judgment was demanded by the defendant finding the amount due plaintiff, and directing it to convey such land in accordance with such contract. In September, 1909, on the return of an order to show cause, amended and supplemental complaints were allowed to be served and filed. The only variance between the original and amended complaints necessary to note consists in alleging the value of the use and occupation of said section 13 as \$1,000 per annum, instead of \$500, and that defendant's claims were in bad faith. The supplemental complaint alleges that the defendant had, without authority of law and in bad faith, entered upon said land in 1908 and cropped 320 acres thereof, and had never accounted to plaintiff therefor, and that such crop was of the value of \$2,500; that in 1909 he had in the same manner again entered and cropped 320 acres of said land, and it is alleged that at the time said complaint was drawn, namely, September 1, 1909, such crop was either being or about to be harvested and was of the value of \$3,000. Included in the relief asked is a prayer that the court adjudge the crop raised during the year 1909 to be the property of the plaintiff, free and clear of all claims of defendant, and for the appointment of a receiver *pendente lite* to take charge of and conserve the same. A hearing was had upon the application for the receivership, and we gather from the evidence there submitted that the controversy between the parties had related to the duty of the plaintiff to show title in itself

before defendant could be required to deed the Sioux Falls property, the defendant laboring under the belief that plaintiff must show title in itself. *Martinson v. Regan*, 18 N. D. 467, 123 N. W. 285. There is a conflict in the evidence as to whether plaintiff ever submitted the contract called for to the defendant, or demanded the delivery of a deed in exchange therefor. One of plaintiff's witnesses testified that on May 10, 1907, notice was served on defendant of the cancellation of the contract in question for default therein, in all things in accordance with §§ 7494 to 7497, Rev. Codes 1905, and that such notice became effective June 11, 1907, but the notice was not placed in evidence and the statements of the witness were mere conclusions of law. We shall, however, consider the matter as though proof of legal service of the necessary notice to declare the contract forfeited and canceled had been made. The defendant paid no attention to such notice, but remained in possession without disturbance and with no demand ever made for the surrender of his possession and the evidence fails to disclose that the plaintiff was ever in actual possession or occupancy of the premises. For some reason issue was not joined on the original complaint until December, 1908, or January, 1909, and no answer had been served to the amended and supplementary complaints, a demurrer thereto being pending. The evidence shows that the crop was severed not less than two weeks before the amended and supplementary complaints were served and the application for a receiver heard. The trial court, in its order refusing to appoint a receiver, found that the defendant was insolvent, and that as a matter of discretion, on the facts before it, a receiver was necessary to protect the plaintiff's rights in the crop of 1909, but that as a matter of law the court was without legal authority to appoint a receiver. Upon notice that the plaintiff would appeal, an order was entered permitting the defendant to dispose of the crop and deposit the proceeds, with the exception of \$500, in any reputable banking institution in Billings county, subject to the order of the court. No objection was made to this order by either of the parties. It is apparent that the court found that plaintiff had some rights in the crop of 1909. In this we do not concur. Much is said in the brief about the fact of the bad faith of the defendant, and much stress is laid by appellant on the evidence showing bad faith, and it is contended that the rights of the plaintiff are dependent, to some extent,

upon that question. From our view of the law as applied to the facts before us, we deem it immaterial whether defendant was acting in good or bad faith. Many interesting questions are raised and discussed, but, for reasons which it is unnecessary to state, an immediate decision of this appeal is imperatively necessary, and we cannot devote the time necessary to a determination of any questions except these which we consider essential to a bare decision of plaintiff's right to a receiver.

One of appellant's contentions is that, under § 5710, Rev. Codes 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, providing that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it, defendant is a trustee of the grain raised during the season of 1909 for its benefit. We need not determine whether either of these provisions might ever be applicable to the facts disclosed on the hearing, because plaintiff itself has effectively disposed of this contention. It concedes that the landowner may elect to take the value of the use and occupation or certain other damages, or that he may waive the value of the use and occupation and elect to take the crop. In the case at bar plaintiff, in bringing this action, elected in a most effective manner to claim only the value of the use and occupation of the premises from defendant. This election was made August 6, 1907, and until September, 1909, no step is shown to have been taken by plaintiff in any manner disaffirming its election so made, and such election was reaffirmed in its amended complaint. In the original complaint it did not intimate that it claimed to be the owner of the crops which had been or might be raised by the defendant; it stood by and permitted the defendant to crop the land for two seasons after making this election, and only sought to disaffirm it when the defendant, by his industry aided by the favorable elements of nature, had raised and harvested a crop valued at over \$6,000. It would seem that, as long as poor or ordinary crops were raised, plaintiff was content to rest upon its claim for the value of the use and occupation of the premises. It is clear, in the absence of such concession on its part which is made in its brief, that it is not, under the circumstances of the case, entitled

to recover both the value of the use and occupation and the crop or damages equaling its value. It is hardly necessary to call attention to the extraordinary results which would follow a holding that it might do so. The result, however, would be that the defendant would be paying the plaintiff for the privilege of furnishing the seed, all the labor, and machinery necessary to sow and harvest the crop, and at the same time giving plaintiff the entire crop raised by his industry. In other words, defendant would be paying rent to plaintiff for the privilege of raising a crop for plaintiff.

We find still another reason why the plaintiff's right to recover is limited. It has seen fit to proceed against the defendant under the provisions of chapter 31, Rev. Codes 1905. This chapter provides for actions to determine conflicting claims to real property, and § 7520, the second section in said chapter, and § 7534, fix the nature of the recovery which may be had in an action brought under that chapter. The last-numbered section is not applicable to the case at bar, but § 7520 provides that a recovery may be had in an action by any party against the defendant personally served or who has appeared, or against the plaintiff, for the value of the use and occupation of the premises and for the value of the property wasted or removed therefrom, in case of a vendee holding over or a trespasser, as well as in case where the relation of vendor has existed. If such recovery is desired by plaintiff, he shall allege the fact, stating particularly the value of the use and occupation, the value of the property wasted or removed, and the value of the real property aside from the waste or removal, and demand appropriate relief in his complaint. A recovery of possession may also be had by the plaintiff or any defendant asking for the affirmative relief.

We think this plaintiff, who has proceeded under the chapter named, is limited to damages for the use of the land in case of his recovery. What we have already said shows the inequity and injustice of the rule contended for by appellant. In *Aultman & T. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756, this question is directly passed upon, and the supreme court of that state says: "The fact that the owner of the premises may recover the rents and profits of the land for which it is being withheld precludes the idea of his right to recover the crops. It is the value and use of the land which the

owner recovers; and not the fruits of the land. A contrary rule would give the owner the value of the use of the land and the value of the labor of the farmer in producing the crop, for the crop contains the value of both. In this case not only did Nelson sow and care for the crop before plaintiff became the owner of the land, but he continued in possession of the same thereafter, and was permitted to harvest and thresh it and remove the same to his own granary. It would be an oppressive rule to permit the plaintiff to remain inactive while this was going on and Nelson adding to the gross value of the crop he had raised in the course of months of husbandry, and then deprive him of the entire property. We sanction no such rule." See also *Brown v. Newman*, 15 N. D. 1, 105 N. W. 941, which has some bearing on this question.

Section 4752, Rev. Codes 1905, provides that the owner of a thing owns all its products and accessions, and it is urged that this makes the appellant the owner of the crop raised on the land in controversy. No authorities are cited, and it is stated in appellant's brief that this statute has never been construed. Without deciding whether this section has any application to the present controversy, we remark that we have the impression that the word "accession" thus used applies to things added to the realty, and that there may be a point of time when the products of a farm cease to be the property of the owner of the land, and that where a crop has been raised by one in adverse possession, it ceases to be the property of the owner of the fee out of possession and becomes the property of the adverse possessor on its severance from the soil. We cite some authorities to this effect: *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663; *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; *Woodcock v. Carlson*, 41 Minn. 542, 43 N. W. 479; *Aultman & T. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; *Phillips v. Keysaw*, 7 Okla. 674, 56 Pac. 695; *Kirtley v. Dykes*, 10 Okla. 16, 62 Pac. 808; *Killebrew v. Hynes*, 104 N. C. 182, 17 Am. St. Rep. 672, 10 S. E. 159, 251; *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164; *Jenkins v. McCoy*, 50 Mo. 348; *Dollar v. Roddenbery*, 97 Ga. 148, 25 S. E. 410; 8 *Ballard*, Real Prop. § 99; *Cobbey*, Replevin,

§ 378; Shinn, *Réplevin*, § 227; 12 Cyc. Law & Proc. p. 977; 8 Am. & Eng. Enc. Law, p. 329. Many authorities are to the effect that even a trespasser or intruder is entitled to the crops raised by him, that is, crops not *fructus naturales*, after severance. Although the subject is elaborately discussed in many of these opinions, we only refer to one which seems to be most directly in point. In *Churchill v. Ackerman*, *supra*, the facts, in brief, were as follows: The defendant entered into possession of land in January, 1892, under a contract whereby the Northern Pacific Railway Company agreed to sell him such land. The contract provided that it should be forfeited in case of default, by serving notice upon the vendee in a manner substantially the same as that required by the statute of this state, and served by the appellant upon the respondent herein. On the defendant defaulting, the railway company, in October, 1896, notified him as provided in the contract, that all his right, title, interest, estate, and possession of, in, or to such land under said contract, had been wholly forfeited and terminated, and on the 31st of December, 1896, the defendant was again served with notice of forfeiture. The defendant remained in possession until about the 20th of August, 1897, and raised a crop during the season of 1897. About the 23d of July, 1897, the railway company sold by a similar contract the land to the plaintiff, who entered thereon and took 100 sacks of wheat raised, harvested, and threshed during that season by the defendant. The suit was brought to recover the value of the remainder of the wheat which had been retained by the defendant, and the court held that the title to crops follows actual possession, and not a right to possession merely, and that, therefore, when a person in adverse possession severs crops before recovery, the title is in him, and that the plaintiff could not recover for the crops raised and harvested by the defendant, although the crop was sown and the work of raising it all done subsequent to the notice of forfeiture taking effect, but that the defendant might recover from the plaintiff for the value of the crop so taken by him.

To entitle the appellant to a receiver of the crops raised in 1909, it is necessary for it to show ownership of the crop or some interest in it by way of lien or otherwise. Further discussion as to its ownership is unnecessary. That it had no lien upon it is clear. The contract between the parties created no lien in favor of the vendor on the

crop after severance. The debt of the respondent to the appellant, if any, either before or after judgment, for the use and occupation, would be an unsecured indebtedness as to personal property of defendant until a levy of execution. To hold plaintiff entitled to a receiver to take possession of and conserve the crop, after severance, for the purpose of subjecting it to its claim for the value of the use and occupation, would be in effect to hold that any creditor may obtain a receiver over personal property, before judgment, to secure the payment of any simple and unsecured debt. Neither our statute nor the policy of our laws contemplates any such remedy.

The doctrine is thus stated: "To warrant the interposition of a court of equity by the aid of a receiver, it is essential that plaintiff should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand, and, secondly, it must appear that possession of the property was obtained by defendant through fraud; or that the property itself or the income from it is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. . . . It is in all cases essential to the exercise of the jurisdiction that the plaintiff should have a present, existing interest in the property over which he seeks to have a receiver appointed." High, Receivers, §§ 11 & 12.

We are compelled to hold that a case was not made on the hearing on which the court could appoint a receiver.

The order of the District Court is affirmed.

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LILLIAN B. TAUGHER v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and Edwin P. Olson, Peter Kerner and Edwin P. Olson, Daniel Preszler and Adam Bollinger.

(129 N. W. 747.)

**Trial — Evidence — Credibility of Witness — Impeachment — Cross-Examination.**

1. In an action for damages for conversion of grain by a common carrier, in-

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Note.—For various phases of the question of conversion by carrier, see notes in 3 L.R.A. (N.S.) 1135; 6 L.R.A. (N.S.) 1048; and 18 L.R.A. (N.S.) 494.

trusted to it for transportation, one of the defenses relied upon by appellant was that the grain did not belong to the plaintiff consignor, but was the property of one C. In attempting to make proof of such ownership after proper foundation laid, and after C. had testified that the grain all belonged to plaintiff, C. was interrogated as to whether he had made statements to the effect that he owned the grain. *Held*: That such questions were proper as going to the credibility of C. as a witness, when offered for that purpose, and that it was reversible error of the trial court to sustain objections to such questions.

**Common Carriers — Failure to Deliver Freight — Evidence — Contract.**

2. On proof of delivery of property to a common carrier in sound condition, and of its failure to redeliver it, a sufficient case is made to sustain a recovery for loss in an action by the shipper on his contract, with certain exceptions, which have no application in this case, but other and different proof may be necessary in such case to sustain an action for conversion against the carrier.

**Trover and Conversion — Words and Phrases — "Conversion."**

3. To constitute conversion, there must be a positive tortious act, a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or the withholding of possession under a claim of title inconsistent with that of the owner.

**Common Carriers — Failure to Deliver — Action on Contract.**

4. The gist of the action on the contract in such case is the failure to deliver. while the gist of an action in trover is the conversion, and the mere showing of a breach of contract may not prove conversion.

**Carriers — Trover and Conversion — Election of Remedies — Burden of Proof — Damages.**

5. If a shipper elects to sue for conversion and fails to establish the elements necessary to constitute conversion, his action must fail unless his complaint states facts necessary to sustain a recovery on the contract or some other proper form of recovery, as the burden is on the shipper, when he seeks the benefit of the measure of damages for conversion, to prove the act of conversion.

**Common Carriers — Conversion — Proof of Demand and Failure to Deliver.**

6. While proof of a demand and refusal to deliver the property or thing may establish conversion in connection with other facts, the demand and refusal are only evidence of conversion when the defendant was in such condition that it might have delivered the property if it would, and conversion does not lie against a common carrier for mere nonfeasance nor for goods stolen from the carrier, not for negligence causing the loss, nor for bare omission.

**Common Carriers — Attachment of Goods Carried — Duty to Notify Shipper.**

7. When goods in transit are taken from the carrier by an officer under a writ of attachment against a third party, it is incumbent on the carrier, in an



action for conversion, to give immediate notice to the shipper, and on failing to give such notice so as to enable the shipper to protect himself, the carrier assumes the burden of establishing the legality of the proceedings on which the attachment was made, and the fact that the writ was regular on its face does not protect the carrier if such writ was in law void.

**Justice of the Peace — Attachment — Time of Issuance — Jurisdiction.**

8. A justice of the peace acquires no jurisdiction to issue a writ of attachment until the summons in the action is issued, as attachment is a provisional or dependent remedy which has no existence until the commencement of an action.

**Common Carriers — Failure to Deliver Goods — Attachment — Proof of Value.**

9. When delivery by a carrier to an officer, under a valid writ of attachment, constitutes conversion, proof of the value of the property delivered, as of the date delivered to the officer, is competent proof of value to support a recovery.

**Chattel Mortgages — Delivery of Mortgaged Property to Apply on Debt — When Lawful.**

10. In the absence of other existing liens on property, a mortgagor may legally surrender the mortgaged property to the mortgagee and authorize its sale and the application of the proceeds to the mortgage debt, though no default has occurred in the terms of the mortgage.

**Justice of the Peace — Attachment — Issue Prior to Delivery of Summons — Evidence.**

11. A justice's summons bore date two days after the date of filing, with the justice, of the complaint, affidavit, and undertaking for attachment, and issuance of the writ of attachment. *Held*: That on the offer of such papers in evidence in an attempt to show that they were simultaneously issued, it was not error to exclude them from evidence.

**Justice of the Peace — Docket Entries — Best and Secondary Evidence — Parol Evidence to Impeach Record.**

12. Section 8350, Rev. Codes 1905, requires a justice of the peace to keep a docket and enter therein in continuous order, with the proper date, each act done during the course of litigation, and § 8351 provides that the docket so kept cannot be disputed in a collateral proceeding; that it or a duly certified transcript thereof is competent evidence of the matters of which it relates. *Held*: That the sections referred to make such docket the best evidence of the facts required to be and which are entered therein by the justice, and that, in the absence of any offer of such docket or a transcript thereof, as evidence, no attempt being made to account for its absence, parol evidence is not admissible, under the facts disclosed, to show that the summons was in fact issued simultaneous with the issuance of a writ of attachment.

Opinion filed November 23, 1910. Rehearing denied January 28, 1911.

21 N. D.—8.

Appeal from the District Court of Stutsman county; *Burke, J.*

Action by Lillian B. Taugher against the Northern Pacific Railway Company and others for the conversion of flax shipped by plaintiff over defendant's railroad. The defendant, the Northern Pacific Railway Company, appeals from a judgment in favor of plaintiff and an order denying a new trial.

Reversed, and a new trial granted.

*Ball, Watson, Young, & Lawrence*, for appellant.

Neglect of duty is not necessarily conversion. 28 Am. & Eng. Enc. Law, pp. 682, 683; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608; *Moses v. Norris*, 4 N. H. 304; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Angell, Carr.* §§ 431-433; *Scovill v. Griffith*, 12 N. Y. 509; *Ross v. Johnson*, 5 Burr. 2825; *Bowlin v. Nye*, 10 Cush. 416; *Hett v. Boston & M. R. Co.* 69 N. H. 139, 44 Atl. 910; *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 363.

Default is essential to mortgagee's right to possession. *Parker v. First Nat. Bank*, 3 N. D. 90, 54 N. W. 313.

It is error to refuse the recall of a witness to lay foundation for impeachment. *Queen's Case*, 2 Brod. & B. 299, 22 Revised Rep. 662; 10 Enc. Pl. & Pr. p. 284; *State v. Nixon*, 47 La. Ann. 836, 17 So. 303; *Covanhovan v. Hart*, 21 Pa. 495, 60 Am. Dec. 57; *Harvey v. State*, 37 Tex. 365; 10 Enc. Pl. & Pr. pp. 285, 286; *Kimmey v. Calloway*, 52 Ala. 222; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277, 39 N. W. 558; *Updyke v. Wheeler*, 37 Mo. App. 680; *Gilmour v. Heinze*, 85 Tex. 76, 19 S. W. 1075; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; 10 Enc. Pl. & Pr. p. 283; *Bartlett v. Cheesebrough*, 32 Neb. 339, 49 N. W. 360; *Kennedy v. Wood*, 52 Hun, 48, 4 N. Y. Supp. 758; *Boyd v. Boyd*, 9 Misc. 161, 29 N. Y. Supp. 7; *Kreiter v. Bomberger*, 82 Pa. 59, 22 Am. Rep. 750.

Carrier must surrender freight to an officer with process valid on its face. 4 Elliott, Railroads, pp. 139, 140, 280, 281, 493, 494; *Hutchinson, Carr.* § 327; 2 *Hutchinson, Carr.* pp. 821, 822, 824, 825, 827, 828, and cases cited; *Merz v. Chicago & N. W. R. Co.* 86 Minn. 33, 90 N. W. 7; *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 363; *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931; *Pin-*

gree v. Detroit, L. & N. R. Co. 66 Mich. 143, 11 Am. St. Rep. 479, 33 N. W. 298; Drake, Attachm. §§ 290, 350, 453; Jewett v. Olsen, 18 Or. 419, 17 Am. St. Rep. 745, 23 Pac. 263; Southern R. Co. v. Heymann, 118 Ga. 616, 45 S. E. 491.

*Lee Combs*, for respondent.

Carrier's delivery of freight to an unauthorized person is conversion. Central R. & Bkg. Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Cooley, Torts, 441, 448, 534; Edwards, Bailments, 162; Cooley's Bl. Com. 150, notes; Angell, Carr. 290, 292; Fisher v. Kyle, 27 Mich. 454; Bullard v. Young, 3 Stew. (Ala.) 46; Indianapolis & St. L. R. Co. v. Herndon, 81 Ill. 143; Illinois C. R. Co. v. Parks, 54 Ill. 294; Esmay v. Fanning, 5 How. Pr. 228; Coykendall v. Eaton, 55 Barb. 188; Bissell v. Starr, 22 Mich. 298; Edwards v. Frank, 40 Mich. 616; Hicks v. Lyle, 46 Mich. 488, 9 N. W. 529; Barnum v. Stone, 27 Mich. 336; Merz v. Chicago & N. W. R. Co. 86 Minn. 33, 90 N. W. 7; Angell, Carr. 223.

Seizure under an invalid process is no defense. Kiff v. Old Colony & N. R. Co., 117 Mass. 591, 19 Am. Rep. 429; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Horn v. Corvarubias, 51 Cal. 524; Mathews v. Densmore, 43 Mich. 461, 5 N. W. 669; Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295; Howe v. Freeman, 14 Gray, 566; Merz v. Chicago & N. W. R. Co. 86 Minn. 33, 90 N. W. 7; Great Western R. Co. v. McComas, 33 Ill. 185; Denver, S. P. & P. R. Co. v. Frame, 6 Col. 382.

Carrier's failure to notify shipper of seizure renders former absolutely liable. Robinson v. Memphis & C. R. Co. 16 Fed. 57; Merz v. Chicago & N. W. R. Co. 86 Minn. 33, 90 N. W. 7; Thomas v. Northern Pacific Exp. Co. 73 Minn. 185, 75 N. W. 1120.

Dealing with property so as to deprive lien holder of it is conversion. Donovan v. St. Anthony & D. Elevator Co. 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; Ellestad v. Northwestern Elevator Co. 6 N. D. 88, 69 N. W. 44; Sandager v. Northern Pacific Elevator Co. 2 N. D. 3, 48 N. W. 438.

SPALDING, J. This is an appeal by one of the defendants, the

Northern Pacific Railway Company, from a judgment in favor of the plaintiff, Lillian B. Taugher, and from an order overruling and denying said defendant's motion for judgment notwithstanding the verdict, or for a new trial. The action was brought against the Northern Pacific Railway Company, a corporation, Peter Kerner, and the firm of Olson, Preszler, & Bollinger. The complaint, omitting the formal parts, alleges that on or about the 3d day of January, 1908, plaintiff was the owner and in possession of 550 bushels of flax at the village of Crystal Springs, North Dakota, of the value of \$561, and that on said day and at said place she delivered said flax to the defendant railway company as a common carrier of freight, and caused it to be loaded in one of its cars, No. 4,077, to be by it transported for her to Duluth, Minnesota, upon the customary terms; that on the same day she was entitled to the possession of 374 bushels of other flax at the village of Crystal Springs, and was then and there in possession thereof, and then and there delivered the same to the said railway company, together with the flax above mentioned, and loaded it in the same car with the first-mentioned flax; that said company received all such flax and undertook to transport it to Duluth for the plaintiff upon the usual terms, etc., and then and there gave plaintiff a bill of lading therefor, and that the value of the flax last mentioned was \$381.48. The complaint then sets forth the plaintiff's right of possession as resting upon a chattel mortgage duly executed, delivered, and filed, covering the last-mentioned flax, and that the conditions of such mortgage and the note secured thereby were in default. It alleges the conversion of the said flax between the 3d and 7th days of January, 1908, at or near the village of Medina, North Dakota, by each and all of the defendants, and a demand thereafter made therefor, and its refusal, and prays judgment for the value of the flax and interest. The defendant and appellant, the Northern Pacific Railway Company, answered admitting that on January 3, 1908, there was delivered to it a car load of flax consigned in the name of the plaintiff to the consignee at Duluth, Minnesota, and alleging that it had no knowledge or information sufficient to form a belief as to the allegations contained in the complaint as to the amount, value, and ownership thereof, or of the nature and extent of the plaintiff's interest and rights therein, and denied all other

allegations. Defendant Peter Kerner answered, denying every allegation of the complaint not admitted, qualified, or explained, and attempted to justify the taking of 327 bushels and 40 pounds of flax, alleging that it belonged to one Christianson and was in a Northern Pacific car at Medina, as constable of Stutsman county on or about the 4th of January, 1908, under an execution (evidently meaning writ of attachment), issued by one Tood, justice of the peace. The defendants Olson, Preszler, & Bollinger answered in substantially the same form as defendant Kerner, except that they attempted to justify the taking of 327 bushels and 40 pounds under a writ of attachment delivered to Kerner as constable and the seizure thereof under such writ, and a sale to satisfy a judgment rendered on the 10th of January, 1908. Neither of the answers identifies any of the flax shipped by the plaintiff. A trial was had in district court and questions were submitted to the jury, namely:

1. Was there any difference in amount in the grain put into the car at Crystal Springs by Christianson and the amount of grain taken out thereof on the following Monday at Medina? This was answered in the affirmative.

2. If so, what was the amount of the difference? The answer to this question was 503 bushels gross, and a general verdict was returned in favor of the plaintiff and against all of the defendants, assessing her damages at \$835.33, with interest from the 4th of January, 1908, on which verdict judgment was entered. The defendant, the Northern Pacific Railway Company, appeal separately. The other defendants are not in this court.

We seldom have an appeal before us in which the record contains so confusing a mass of objections, motions, and offers. It contains 79 assignments and 137 specifications of error. The objections of plaintiff to questions, and the motions to strike out answers, in most instances, fail to specify adequately the grounds on which they are based. We infer from the briefs that many of them made by respondent were intended to be directed to the admissibility of testimony or evidence of justification under the answer of appellant, but they are invariably inadequate to raise that question. We are at a loss to determine whether the appellant defended the action on the theory that it could justify the delivery of the grain to a third party under

its own general denial, or that it might do so under the attempted pleas of justification contained in the answers of the other defendants. We set forth enough of the facts to show the theories of the prosecution and defense, and our conclusions on the controlling question properly before us, but omit consideration of many which we deem immaterial.

It appears that the plaintiff and one Christianson owned two adjoining quarter sections of land about one and a half miles from Crystal Springs station in Kidder county. The plaintiff resides during the winter in Minneapolis, Minnesota, and the remainder of the year on her land near Crystal Springs. The flax first referred to in the complaint was grown on her land, and that last referred to, on the land belonging to Christianson. Christianson did the work of cultivating her land and harvesting the crop, and on the 4th day of January, 1908, plaintiff's testimony shows that he completed by her instruction the loading of the flax raised on both places, into a car of the defendant railway company at Crystal Springs, for which he took a bill of lading in the name of the plaintiff, the flax being consigned by her direction to a firm in Duluth. It was not weighed on shipment. Both plaintiff and Christianson testified that the flax grown on the plaintiff's land belonged to her, and that he was hired to do the work on her place during the season of 1907. She held Christianson's note for \$1,000, bearing date May 24, 1907, and due on or before April 1, 1908, secured by chattel mortgage covering the flax raised on his land during the season of 1907. This mortgage bore even date with the note and contained the usual provisions. Plaintiff and Christianson testified that, by agreement between them, he turned over to her the flax covered by such mortgage, and it was to be sold with the flax raised on her land, and the proceeds of the mortgaged flax retained by her to apply on the indebtedness covered by the mortgage. When the car reached Medina station, 8 miles from Crystal Springs, on Saturday, the 4th of January, it was side tracked, and on Monday, the 6th, all the flax then in the car was attached by the defendant Kerner, as constable of Stutsman county, on the writ of attachment referred to in the pleadings, at the suit of the firm of Olson, Preszler, & Bollinger, instituted in justice court upon a debt due from Christianson to said firm. All the flax then in the

car was removed, judgment was obtained against Christianson, and the flax sold on the 10th of February, 1908, and the proceeds paid into justice court. The affidavit and undertaking for attachment and complaint bore date and were filed in such court on the 4th of January, 1908, but the summons bore date January 6, 1908, and the sheriff's return showed that the papers came to his hands on the latter date.

1. It is contended by the appellant that there is no misconduct shown on its part which constitutes an act of conversion such as is necessary to sustain the action of trover. There was much testimony submitted regarding the amount of flax removed from the car at Medina and the amount shipped, but no direct evidence showing what became of the difference of 503 bushels found by the jury, except that Christianson testified that when the loading was completed at Crystal Springs, he procured locks, and closed and locked the car doors. He and others testified that the flax covered the highest grain mark, and reached a point about 2 feet below the roof on the car. It was shown that, when the car reached Medina and when the attachment was levied, one of the outer doors was partially open, and only about 2 feet of flax in the car, but men employed on the train, some of whom rode in the caboose, testified that they had seen none upon the track and none leaking from the car, while it was being picked up at Crystal Springs or switched in the yards at Medina, and there was no indication of the car being leaky. An inland common carrier is an insurer against loss of property consigned to it for carriage, between its receipt at shipping point and arrival at destination, when unaccompanied by the consignor, except through loss occasioned,

1. By an inherent defect, vice, or weakness, or spontaneous action of the property itself.

2. The act of a public enemy of the United States or of this state.

3. The act of the law, or

4. Any irresistible superhuman cause. Section 5690, Rev. Codes 1905. *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826. On proof of the delivery of the property to the carrier in sound condition, and of the failure to redeliver it, a sufficient case is made to sustain a recovery for loss by the shipper, and the burden is upon the carrier to exonerate itself from lia-

bility in case of loss, by showing that such was occasioned by one or more of the exceptions mentioned. *Duncan v. Great Northern R. Co.* supra. The loss being shown, the burden would fall upon the appellant, in a proper action, to excuse itself on some of the grounds above mentioned. It failed to do so as to the 503 bushels of flax. The plaintiff, having proved the delivery and failure to redeliver, would be entitled to recover in an action on her contract or some other suitable form of action, but does it entitle her to recover in an action for the conversion of the 503 bushels? To constitute conversion there must be a positive tortious act, a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or the withholding of possession under a claim of title inconsistent with that of the owner. 8 Wait, Act. & Def. 1194; *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789, 7 So. 914; *Terry v. Binghamton Nat. Bank*, 30 Am. St. Rep. 87 and note (93 Ala. 599, 9 So. 299); 2 *Kinthead, Torts*, § 582; *Tinker v. Morrill*, 39 Vt. 477, 94 Am. Dec. 345; *Magnin v. Dinsmore*, 70 N. Y. 417, 26 Am. Rep. 608. The gist of an action on the contract is the failure to deliver, but the gist of this action is the conversion. *Bigelow Co. v. Heintze*, 53 N. J. L. 69, 21 Atl. 109. To maintain the action some wrongful act on the part of the appellant must be shown. The mere showing of a breach of contract does not necessarily prove conversion, though the defendant may be liable on the contract. The rules of evidence and measure of damages are not the same in an action for conversion and in one on the contract for carriage. A common carrier is liable for loss of property in transit in many instances where it is chargeable with no wrongful act, and even where its loss is without fault of the carrier, but the shipper is confined in such cases to the proper remedy. In most cases more than one remedy is applicable, and he has his election, while in others an action for conversion does not lie though one for damage for breach of contract may. If the shipper elects to sue for conversion, and is unable or fails to establish the elements necessary to constitute conversion, he must fail in that form of action. The burden is on the shipper, when he elects to seek the benefit of the measure of damages in an action charging conversion, to prove the act of conversion by showing a wrongful disposition or wrongful withholding of the property. *Moore, Carr.*



217; *Wamsley v. Atlas S. S. Co.* 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896; *Tinker v. Morrill*, 39 Vt. 477, 94 Am. Dec. 345; *Magnin v. Dinsmore*, 70 N. Y. 417, 26 Am. Rep. 608; *Whitney v. Slauson*, 30 Barb. 276. In such case the demand and refusal may be prima facie evidence of the conversion, or, when the other facts warrant it, of course may establish the conversion, but the demand and refusal are only evidence of conversion where the defendant was in such condition that he might have delivered the property if he would. *Tinker v. Morrill* and *Whitney v. Slauson*, supra; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; 24 Am. St. Rep. note page 807. The action for conversion for failure to deliver or return on demand does not lie against a carrier for a mere nonfeasance when the nonfeasance of the defendant was the cause of the loss of the goods, nor does it lie for goods stolen from the carrier nor for negligence causing the loss. It must be for an actual wrong, an injurious conversion, something more than a bare omission. *Goldbowitz v. Metropolitan Exp. Co.* 91 N. Y. Supp. 318; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Abraham v. Nunn*, 42 Ala. 51; *Dearbourn v. Union Nat. Bank*. 58 Me. 273; *Yale v. Saunders*, 16 Vt. 243; *Moses v. Norris*, 4 N. H. 304; *Packard v. Getman*, 4 Wend. 615, 21 Am. Dec. 166; *Bailey v. Moulthrop*, 55 Vt. 13; *Bowlin v. Nye*, 10 Cush. 416; *Tinker v. Morrill*, 39 Vt. 477, 94 Am. Dec. 345; *Magnin v. Dinsmore*, 70 N. Y. 417, 26 Am. Rep. 608; *Whitney v. Slauson*, 30 Barb. 276. It is unnecessary to review these authorities. The cases of *Wamsley v. Atlas S. S. Co.* and *Tinker v. Morrill* and authorities therein cited and quoted are directly in point, and we conclude that plaintiff failed to establish the conversion of the 503 bushels of flax. As we have indicated, she still has her remedy in a proper action. The complaint in this case will not justify a recovery upon the contract.

2. Appellant contends that it is not liable in this action for the flax attached by the officer. In this we think it is mistaken. As before observed, the appellant did not plead justification; and in view of the importance of this question, and of the fact that only three members of this court participate in this decision, and that the objections by respondent to evidence were, in our opinion, inadequate and too indefinite to raise the question, we shall not pass upon the necessity of pleading justification. If the appellant wrongfully delivered

the flax attached, to the officer, it is clear, under the authorities, that this constitutes an act of conversion, and, as under the pleadings and facts disclosed no demand was necessary, the date of the conversion was the date of the delivery, rather than the date of the demand. *Wellman v. English*, 38 Cal. 583; *Moore v. Murdock*, 26 Cal. 515; *Ledley v. Hays*, 1 Cal. 160; *Boulware v. Craddock*, 30 Cal. 190. Appellant urges that the process or writ by which the flax was attached and taken was regular upon its face, and that this is as far as the appellant or the court is required to investigate in deciding this question. We have spent much time in an effort to determine what the law is as applicable to the facts disclosed, and have concluded that it is unnecessary to pass upon the regularity of this writ and its justification of the appellant. The authorities, so far as we find them referring to the subject, are uniform in holding that something more than the regularity of the writ of attachment on its face may be necessary. The carrier must notify the shipper of the taking of the property, so as to enable him to protect himself by making a defense or otherwise, and, on the failure of the carrier to give such notice, it either becomes absolutely liable or assumes the burden of proving the regularity of all proceedings on which the attachment rested. Without intimating any views as to the first line of authorities, it is sufficient to say that, in the case at bar, the carrier gave no notice to the shipper of the attachment, and it thereby assumed the burden of establishing the regularity of the proceedings on which the attachment was made. *Merz v. Chicago & N. W. R. Co.* 86 Minn. 33, 90 N. W. 7; cases cited in note in 34 Am. St. Rep. page 736; *Horn v. Corvarubias*, 51 Cal. 524; *Jewett v. Olsen*, 18 Or. 419, 17 Am. St. Rep. 745, 23 Pac. 262, and many authorities, hold that a plea of justification is bad unless it avers the giving of such notice. 2 *Hutchinson, Carr.* § 743, note 23. None of the answers contained any such averment. That these proceedings were so irregular as to render the writ of attachment void can hardly be questioned. As we have shown, the papers were all filed and the writ of attachment issued on the 4th of January. The summons was not issued until the 6th of January, as shown by its date. Section 8358, Rev. Codes 1905, fixed the commencement of an action in justice court at the time of the issuance of the summons, when no voluntary appearance is made.

and § 8369 provides that a writ of attachment of personal property of the defendant may be issued by the justice at the time or after the issuance of the summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, stating the facts necessary to be stated, as grounds of attachment. It is clear from this provision that the justice acquires no jurisdiction to issue a writ of attachment until the summons is issued, and not having such jurisdiction, the writ issued in the instant case conferred no authority to make the attachment. There must first be an action, and there is no action until the summons is issued. Attachment is a provisional or dependent remedy, and has no existence independent of an action. *Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714; *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296; *Hall v. Grogan*, 78 Ky. 11. We hold that the appellant failed to bring itself within the rule referred to, by failing to show that its default was occasioned by the act of the law, and that, in the absence of other considerations, it would be liable for the flax taken by the constable.

3. It is contended that the proof fails to show the value of the flax at the date of the conversion, if there was a conversion. This contention rests upon the assumption that the conversion occurred on the 11th of February, when the demand was made. The proof submitted related to the value of the flax at the date of the delivery to the constable, and this was the date of the conversion.

4. Numerous errors assigned relate to the refusal of the court to allow the defendant to impeach the testimony of the plaintiff's witness Christianson as to statements concerning the ownership of the flax in question. While not pleaded, one theory of the defense in the trial court was that all the flax belonged to Christianson, and that the shipping of it in the name of the respondent had been arranged between Christianson and her for the purpose of defrauding Christianson's creditors. The witness Christianson was inquired of regarding certain statements as to the ownership of the flax raised on respondent's land during the year 1907, and by the questions it was intimated that an attempt would be made to show that he had told other parties that all the flax on both places raised during 1907 belonged to him. He denied making such statements, and the court sustained objections to questions asked the witnesses to whom reference was made in the in-

quiries of Christianson as to his having made them. These questions were apparently excluded on the theory that they were intended to serve as admissions on the part of Christianson as the agent of respondent, and that she should not be bound by such admissions if made. We, however, think their exclusion was error prejudicial to appellant. One of the purposes of the testimony sought to be introduced was to discredit the testimony of Christianson to the effect that a portion of the flax belonged to Miss Taugher. It is clear that evidence of contradictory statements made by him was admissible for this purpose, and its admission might have influenced the jury in arriving at its verdict, provided, there was any evidence to go to the jury as to the ownership of all of the flax by Christianson. The circumstances and the relations of the parties, as shown, were such as to render impeaching testimony on this subject material, and we cannot say that, had it been received, the jury might not properly have found the ownership in Christianson.

5. It is insisted that proof of default in the terms of the mortgage entitling plaintiff to possession of the flax was necessary. We do not concur in this view. If the flax belonged to Christianson, and if respondent held a valid mortgage on it, in the absence of existing liens held at the time of shipment by any of the interested parties, he could legally surrender the flax to her, and authorize her to sell it and apply the proceeds on the mortgage debt, even though no default had occurred in the terms of the mortgage; but even with existing inferior liens they would not have been injured, as its value was less than the debt secured by the mortgage to plaintiff. *Lovejoy v. Merchants' State Bank*, 5 N. D. 624, 67 N. W. 956. We are not concerned with what the rights of the parties might have been had the defendants been claiming under a subsisting lien at the time of the shipment.

6. It was not error for the trial court to refuse to admit in evidence the summons, undertaking for attachment, writ of attachment, affidavit for attachment, and complaint. They did not tend to prove the facts which they were offered to prove. They tended to show that the summons was not issued until two days after the writ of attachment had been issued, and, for the reasons above stated, the latter was void. Neither was it error to reject the proffered parol evidence. The questions indicated an attempt to show that a mis-

take had been made in dating the summons, and that, in fact, it was issued concurrently with the writ of attachment. Such evidence was inadmissible. Under § 8350, Rev. Codes 1905, the justice is required to keep a docket in which he shall enter in continuous order, with the proper date, each act done during the course of litigation, and by § 8351, the legislature has said that such docket is deemed true and correct in all matters appearing therein as required by law, and cannot be disputed in a collateral proceeding, and that it or a duly certified transcript thereof is competent evidence of the matters to which it relates. Such docket and entries therein of the dates and facts required to be entered were the best evidence, and should have been offered before secondary evidence was admissible. We need not decide whether impeaching evidence would have been admissible had the docket been offered, and had it shown the same dates of issuance given on the papers. No tender was made of such record or a certified transcript thereof as evidence, and its absence was not excused, hence, secondary evidence was incompetent.

The judgment and the order of the district court denying a new trial are reversed and a new trial granted, as to the appealing defendant, the Northern Pacific Railway Company, only.

All concur, ELLSWORTH, J., disqualified, and MORGAN, Ch. J., not participating.

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EDWARD T. MURRAY for the use of Emmerson K. Bull v. E. K. LAMSON.

(128 N. W. 1039.)

**Appeal and Error — Adverse Claims — Tax Deed.**

On an appeal in an action to determine adverse claims, where the judgment roll only is before the supreme court, and it appears by defendant's counterclaim that the tax deed under which he claims and is in possession is a valid tax deed, and the findings show that all tax proceedings were in accordance with the statute, and that all the grounds urged by plaintiff to show defects in the tax proceedings do not exist, *held*, that defendant's title is valid, and that

the deed under which he claims vested a complete title in him, and that the deed under which the plaintiff claims conveyed nothing.

Opinion filed November 25, 1910. Rehearing denied December 21, 1910.

Appeal from District Court, Burleigh county; *Winchester, J.*

Action by Edward T. Murray, for the use of Emmerson K. Bull, against E. K. Lamson. Judgment for defendant, and plaintiff appeals.

Affirmed.

*W. L. Smith* and *J. W. Bull*, for appellant.

*Newton & Dullam*, for respondent.

MORGAN, Ch. J. This action is based upon conflicting claims to the east 30 feet of lots 11 and 12, of block 68 of the original plat of the city of Bismarck. E. K. Bull claims to be the owner as against his grantor, Murray, but admits that the deed through which he claims is void as against the defendant, Lamson, who was in possession of the premises when the deed was delivered to him. The plaintiff demands that the defendant be dispossessed, and possession established in him.

The action is brought by Murray on behalf of Bull, and, although the deed is void as between Bull and Lamson, the claim is that it is valid as to all other persons. The grantee in that deed is permitted to enforce his deed through his grantor, under the principle laid down in *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258, and cases subsequently decided by this court.

Lamson, the defendant, also claims title and possession under a subsequent deed from Murray to him. The rights of the parties under these conflicting deeds we need not determine, as it is clear to us that the defendant is the absolute owner, and entitled to the possession of the land under a tax deed delivered to him in January, 1902, pursuant to a certificate of sale dated January 6, 1898, for the taxes of 1897. Lamson also claims title to this land and the rightful possession thereof under this tax deed, and he pleads this deed as a basis for his right to the possession of the land by way of counterclaim, and asks affirmative relief based thereon.

On this appeal the evidence is not before us. The trial court refused to settle a statement of the case, and this court denied an application

of the plaintiff to compel the settlement of such statement by the trial court. The consequence of such refusal is that this court has only the judgment roll before it to determine the appeal. In other words we are to determine from the pleadings and findings whether the judgment is sustained. If the judgment is sustained by the pleadings and findings, then it must be affirmed. If the deed of January 11, 1902, was a valid deed, Murray had no title to these premises when the deed to Bull was executed, and that deed conveyed nothing to Bull, as the grantor had no title to convey. The deed is set forth in the findings, and is regular on its face. The court further finds expressly that the notice of the expiration of the time for a redemption was duly given, and no redemption was made or attempted to be made. It is also expressly found that Lamson was actually and openly in possession of the premises when the tax deed was delivered to him, and has been in such possession since May, 1899. There is a further finding that a certificate of sale was duly issued to the defendant pursuant to such sale, and that a deed was duly executed by the county auditor and delivered to him. That deed shows that all the proceedings in relation to the assessment and sale were regular and in compliance with the statute. These facts are all pleaded as a counterclaim, and as a basis of defendant's absolute ownership of these lots, and relief is demanded by the defendant that the title be quieted in him and that he be adjudged to be the owner of the same.

In view of these findings, we are agreed that the facts found sustain the judgment in defendant's favor, to the effect that he was the owner of the lots at the time Bull received his deed from Murray, and that his possession has continued since May, 1890. In other words, the tax deed under which he now claims invested him with the title and ownership of the lots, and divested Murray of any prior claim that he may have had thereto. The title having passed to the defendant before Bull received his deed, Murray had no title to convey when he gave the deed to Bull, and nothing was conveyed thereby.

The findings are explicit that all proceedings leading up to defendant's tax deed were regular and in accordance with the statute, and that the deed was, in all respects, a valid deed. Every ground alleged as to the invalidity of the tax proceedings is expressly found not to exist.

The tax deed on which the defendant relies was valid, and from that fact it follows that the judgment is affirmed. All concur.

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STATE OF NORTH DAKOTA v. WILLIAM EMPTING.

(128 N. W. 1119.)

**Criminal Law — Bill of Particulars — Discretion of Court.**

1. Whether a demand for a bill of particulars in a criminal case is ever permissible in this state not decided, but, conceding that it may be demanded, it is a matter that is always within the discretion of the trial court, and such discretion will not be interfered with on appeal unless it appears that there has been a manifest abuse thereof.

**Criminal Law — Trial — Leading Questions — Discretion of Court.**

2. The allowance of answers to leading questions or questions which assume facts not proven is strictly discretionary with trial judges, and unless there appears a clear abuse of that discretion, appellate courts will not disturb their rulings.

**Criminal Law — New Trial — Verdict Against Evidence — Specification of Error.**

3. Whether a verdict in a criminal case is against the evidence or not will not be reviewed on appeal unless the motion for a new trial specifies as error that the verdict is against the evidence, and failure by the state to object to the motion for a new trial when made without any specification is not a waiver of the right to raise the question in this court.

**Trial — Evidence.**

4. Objections to questions and motions to strike out answers considered, and the rulings of the trial court sustained.

Opinion filed November 25, 1910.

Appeal from the District Court of Burleigh county; *Winchester, J.* After a trial and conviction for keeping and maintaining a common nuisance, defendant appeals.

Affirmed.

*Newton & Dullam*, for appellant.

*Andrew Miller*, Attorney General, *Alfred Zuger, C. L. Young*, and *F. C. Heffron*, Assistant Attorneys General, for respondent.



MORGAN, Ch. J. The information charges defendant with keeping and maintaining a nuisance by the sale and keeping for sale of intoxicating liquors. There is no specific place set forth in the information where the nuisance was kept but it alleges only that it was located within the city of Bismarck in Burleigh county, North Dakota. The defendant demanded a bill of particulars showing the specific place or building where the nuisance was kept, the kind of liquors sold, when and to whom sold. The demand was not verified. The trial court denied the demand, and the defendant excepted.

The appellant claims that this ruling was prejudicially erroneous, especially so far as the demand for the precise location of the nuisance is concerned. As to the particulars demanded, except the location, the appellant practically concedes that they cannot properly be demanded. The demand states that the defendant cannot understandingly prepare for trial without this specific information, on account of the indefiniteness of the allegations of the information.

Conceding, without deciding expressly, that a refusal to compel the state to furnish a statement of the precise location of the alleged nuisance may, under some circumstances, be erroneous and prejudicial, we are satisfied that the refusal was not error in this case. The defendant had a preliminary examination at which the desired information could have been secured. Further, the demand was not verified. Further, there is nothing in the record of the trial, showing that any prejudice followed, or could follow, from the ruling.

There is no statute in this state regulating or providing for a bill of particulars in criminal cases. The statute provides that the information must be direct and certain, as to the party and crime charged, and that the offense must be charged in such a manner as to enable a person of common understanding to know what is intended. The particular circumstances need not be alleged unless necessary to constitute a complete offense. Rev. Codes 1905, § 9849. It has been held in this state that a specific description of the place where a nuisance is alleged to have been maintained need not be set forth in the information, except in cases where the state claims an abatement of the nuisance. It is not necessary to particularly describe the place where punishment of the keeper only is sought. Said section, therefore, has no application to informations in cases like the one under

consideration. In view of the fact that the information conformed to the statutory requirements, and of the preliminary examination, and that the demand was not under oath, we are satisfied that the trial court did not abuse the judicial discretion vested in it, in denying the demand for such particulars, even conceding that trial courts may properly, under some circumstances, grant such request.

We do not hold, in this case, that the fact of having had a preliminary examination always necessarily constitutes a waiver of the right to demand a bill of particulars, nor that the failure to verify the request or demand is in all cases fatal to the granting of the demand. But these matters, considered in connection with the evidence at the trial, conclusively show that there was no abuse of discretion in denying the request in this case. In some states the privilege is not ever allowed in criminal cases. Where allowable, it is not subject to review, unless the judicial discretion of the trial court has been clearly abused. In *Mathis v. State*, 45 Fla. 46, 34 So. 287, there is an exhaustive consideration of this question and a review of the authorities. In that case it is said: "Such an application or motion, however, is not founded upon a legal right, but is a matter resting within the sound judicial discretion of the court, depending entirely upon the nature and circumstances of each particular case, as they appear to the court before whom the trial is had, and the refusal of the trial judge to grant such motion will not be disturbed or reversed by an appellate court unless there was an abuse of such discretion. . . . We will add that, under the system of criminal pleading prevailing in this state, the forms of indictment and informations generally used, we can conceive of but few criminal cases wherein it would be necessary to order a bill of particulars."

In *Com. v. Wood*, 4 Gray, 11, the court said: "But although such is the uniform practice, a specification cannot be claimed as a matter of right on the part of the defendant. This power, from its nature, must rest in the sound discretion of the court before which an indictment is pending, to be exercised according to the circumstances of each particular case. In this respect it stands on the same footing with the general authority of the court to regulate the course and conduct of trials, and, being a matter resting in the discretion of the judge,

the mode in which the power is exercised is not properly a subject of exception."

See also 32 Cyc. Law & Proc. p. 371, and cases cited. Bishop, New Crim. Proc. § 643; McClain, Crim. Law, § 976; Wharton, Crim. Pl. & Pr. § 702; Com. v. Giles, 1 Gray, 466.

Objections are also urged because the state's attorney asked questions which assumed facts unproven, and questions which were leading, which were allowed to be answered although objected to. The following are some of the questions: "Are you acquainted with Empting's place of business?" "Will you describe this Empting's place?" "Do you know his place of business in the city of Bismarck?" The other questions were similar to the ones given, and simply assume that the defendant had a place of business. The fact that he had a place of business where intoxicating liquors were kept or sold was not suggested by any of these questions, or assumed to be true by any question, and, as a matter of fact, such questions were generally in the nature of preliminary questions. The further fact appears that at the place known as "Empting's Place" goods were sold, such as cigars, tobacco, and canned goods. The jury was expressly and pointedly instructed that keeping a place is not a criminal offense, and before it becomes such under the prohibitory laws of this state, intoxicating liquors must be kept or sold at such place, or such place must be resorted to for the purpose of drinking intoxicating liquors. A question may assume a fact, and not be necessarily prejudicial if answered. The allowance of answers to such questions is largely in the discretion of the trial judge, and it is only in cases of a clear abuse of that discretion that appellate courts will reverse a conviction where answers are permitted to such questions. We think it would be an unwarranted assumption to hold the admission of that testimony prejudicial under such instructions. Although these questions assume a fact, to some extent, we think no prejudice followed or could follow. There is no place on this record for an assumption that the minds of the jurors might have been confused by such questions, and therefore failed to distinguish what the issue was as between having a place of business and a place of business where intoxicating liquors were dealt in. The jury was explicitly charged as to this distinction.

Exception was taken to the admission in evidence of the assessor's

book showing that goods and merchandise valued at \$50 were assessed to the defendant. The claim is that such property was not shown to have been at the place in question. The property was listed by the defendant while not at his place of business, but on the street. There was no direct statement by him that this property was located at this place, or where it was located, and the assessor did not ask him in terms where this property was located. The list was signed by the defendant. The assessor had examined the building before this, and was familiar with it, and he asked the defendant whether he did not own cigars and tobacco, and the defendant answered that he did. The assessor testifies, "It is just my supposition that it is the same property there in the building. It was signed by him there in my presence as such."

The defendant made a motion to strike out all the testimony of the assessor and the assessment list and affidavit, on the ground that there was nothing to show that this property was at the place alleged to be a nuisance. The contention is that there is nothing in the assessor's evidence further than what was a mere supposition on his part. Considered in connection with what the assessor knew of the building, and what passed between him and the defendant when the property was listed, it was not error to allow the jury to consider it. The record shows that there was a place of business known as "Empting's Place," and that cigars and other goods were kept there, and that intoxicating liquors were also sold there, and that the defendant was at this place at different times. The defendant listed such cigars and other property for assessment. There is no evidence that he owned cigars at any other place. The assessor testified, on cross-examination, that he inferred or supposed the cigars to be at the place in question. What the assessor's inference was from all his conversation with the defendant, and his knowledge of the place and building, was a proper matter for cross-examination, and the weight of such answers was for the jury. It was not error to refuse to strike out the assessor's evidence.

It is now claimed that the verdict is not sustained by the evidence. The precise contention relating thereto is that there is no evidence that the defendant kept or had control of the place. A motion for a new trial was made and overruled. The motion was made and heard on a settled statement of the case. There is no specification in the motion

for a new trial that the verdict is not sustained by the evidence, or that it is against the evidence. The insufficiency of the evidence was nowhere raised or challenged before the trial court, so far as the record shows. We cannot, therefore, review the evidence to determine its sufficiency.

Sec. 10082, Rev. Codes, 1905, provides that the notice of motion for a new trial must specify the errors relied on as grounds for the granting of the motion. The matter of thus specifying the errors in the motion is not a necessary step to insure a review of the evidence, and it is not waived by not being objected to by the state when the motion for a new trial is presented or argued.

The same strictness is not required by the statute, in specifying wherein the evidence is insufficient to sustain the verdict in a criminal, as in civil cases. The requirement is that the motion for a new trial must state the ground. Among these grounds is that the verdict is clearly against the evidence. Without such or an equivalent specification, the state or the trial judge may well presume that the verdict is not attacked as being based on insufficient evidence. In this case we have before us nothing showing that the trial court has ever considered whether the evidence sustains a conviction or not. This omission in the motion precludes our right to review the sufficiency of the evidence.

This disposes of all the assignments argued, and it follows that the judgment must be affirmed. All concur.

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STATE OF NORTH DAKOTA v. MAXIM HAKON, Zenke Hakon,  
and Lodmere Rodak.

(129 N. W. 234.)

**Criminal Law — Witnesses — Exclusion from Court Room.**

1. It is discretionary with trial courts whether or not all witnesses shall be excluded from the court room during the trial.

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*Note.*—The sufficiency of charging a crime in the language of the statute is considered in a note in 94 Am. Dec. 253, and the question of the right to introduce evidence of another and independent offense in a criminal case in order to show motive for the commission of the crime charged is considered in a note in 62 L.R.A. 194.

**Criminal Law — Indictment and Information — Following Language of Statute — Poisoning Animals.**

2. Where the information follows the language of the statute making it a crime to wilfully poison domestic animals, and it further designates the animal poisoned as a horse, and states the ownership thereof, no further description of the horse is necessary.

**Indictment and Information — Making More Definite — Discretion.**

3. Whether a motion to make an information more definite may ever be granted as a matter of right, not determined, but if permissible there was no abuse of discretion in denying such motion in this case.

**Criminal Law — Witnesses — Impeachment — Cross-Examination.**

4. The rule on cross-examination of witnesses in criminal cases is that a wide latitude is permitted as to the motives and feelings of such witnesses towards defendants, and it is prejudicial error to refuse to permit any cross-examination on those matters.

**Witnesses — Cross-Examination — Impeachment — Motives — Other Offenses.**

5. It is error to sustain an objection to a question on the cross-examination of a complaining witness, as to whether he had offered a bribe to a person if he would appear and testify as to certain matters against the defendants.

**Criminal Law — Evidence — Motions — Proof of Independent Offenses.**

6. It is not permissible to prove another and independent offense against the defendants on the ground that it shows a motive for the commission of the crime charged, unless such proof fairly and reasonably tends to show such motive.

**Criminal Law — Evidence — Conspiracy — Acts of Third Persons.**

7. It is error to admit proof of acts and declarations of third persons not in the presence of the defendants, unless a conspiracy has been shown between the persons making such declarations or doing such acts and the defendants, and that such acts or declarations were made or done in furtherance of the objects of the conspiracy.

**Criminal Law — Poisoning Animals — Information and Indictment.**

8. Where the information simply charges malicious and felonious administering of poisons to domestic animals, it is error, in view of the provisions of the statute, to show the poisoning of such animals by exposing poison with intent that it shall be taken by them.

Opinion filed December 8, 1910.

Appeal from the District Court of Ward county; *Goss, J.*

Defendants were convicted of maliciously poisoning horses, and appeal.

Reversed.

*F. J. Lambert*, for appellant.

*Dudley L. Nash*, State's Attorney, *Andrew Miller*, Attorney General, and *Alfred Zager* and *C. L. Young*, Assistant Attorneys General, for respondent.

MORGAN, Ch. J. The defendants were informed against for the offense of wilfully poisoning domestic animals, and the charging part of the information is as follows: ". . . did wilfully, unlawfully, and feloniously administer poison, . . . to a domestic animal, to wit, a certain horse, then and there and by the means aforesaid causing the death of said horse, said horse then and there being the property of one Mike Kazema." After arraignment, the defendants demurred to the information, on the ground that it does not state facts sufficient to constitute a public offense. This demurrer was overruled. After demurring, the defendants made a motion that the information be made more specific, so far as the description of the horse therein alleged to have been poisoned was concerned. This motion was also denied. After the jury was impaneled and sworn, the defendants objected to the introduction of any evidence under the information, for the alleged reason that it did not state facts sufficient to constitute a public offense. This objection was also overruled. The defendants excepted to all of these rulings.

The objections urged present the same question, that of the insufficiency of the description of the horse alleged to have been poisoned. The allegations of the information follow the language of the statute defining the offense, which provides that any person who wilfully administers poison to any animal, the property of another, is punishable by imprisonment, etc., and these allegations are sufficient in a strictly statutory offense. The kind of domestic animal is alleged, and the ownership thereof. These allegations describe the offense, and cover every ingredient thereof laid down in the statute. *People v. Keeley*, 81 Cal. 210, 22 Pac. 593. The demand for a more specific description of the horse was properly overruled, and the demurrer as well, inasmuch as the information contains a direct and certain statement of the offense charged. We have recently held that questions pertaining to making informations more definite and specific are matters of discretion with trial courts, and this court will not interfere

with such discretion unless manifestly abused. In this case there was no abuse of such discretion, and no error in denying the motion, although the question whether district courts may not, under some circumstances, grant such a motion, is not decided. *State v. Empting*, ante, 128, 128 N. W. 1119, decided at this term, is followed in this case. The information charges the malicious administering of poison to the plaintiff's horses, which is sufficient as a charge so far as administering poison is concerned.

Error is also assigned because the court made an order, before the trial, excluding all the witnesses from the court room during the trial except the one under examination, but later the complaining witness was permitted to remain in the court room during the trial, after he had testified. Matters pertaining to the exclusion of witnesses from the court room during the trials are discretionary with the trial court, and there was no abuse of such discretion in this case.

The cross-examination by the defendant's attorney of the state's witnesses was restricted within very narrow limits. Many questions were objected to, and the objections sustained on the cross-examination of the complaining witness, which called for answers which might have thrown much light on the motives of this witness as to certain acts, and as to his relations and feelings towards the defendants. This is especially true of the following questions:

"Q. Did you, about a month ago, offer to Jack Galamaha, 100 bushels of oats if he would appear for you as a witness in this case, and testify that he saw these three defendants mixing up poison the night before the horses were poisoned?"

"Q. Since you had these three defendants arrested, and since you came to Minot on this trip, and about four days ago, didn't you say, right here in Minot, and just outside of the courthouse, that if Hakon got away from this, that you would have him arrested twice more?"

Both of these questions were objected to on the ground that they were incompetent, irrelevant, and immaterial, and the court sustained these objections on that ground alone. The record shows much hostility between the complaining witness and the defendants. Suits and land contests had been brought, and tried, and various acts of hostility are claimed to have been committed by the complaining witness against the defendants. If the complaining witness had offered to bribe a witness to testify falsely, or had made threats of further arrests, it would



tend to show his animus towards the defendants, and that his motives in the prosecution were bad. These facts would have an important bearing on his credibility before the jury. The rule is that great latitude is allowed on cross-examination to show what the attitude of a witness is towards the defendant, and whether he has been guilty of attempts to cause witnesses to swear falsely by bribes or other methods. In *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614, the judgment was reversed for the reason that a cross-examination was not permitted as to the motives of the witness, and this court said in that case: "It is therefore the absolute right of the party attacking the credibility of such a witness to elicit by cross-examination, the facts and circumstances which tend to prove the existence and extent of the supposed improper motives." Of course some considerable latitude rests with the trial judge as to the limits within which such cross-examination may be permitted, but to cut off all cross-examination on these matters is not sanctioned under any circumstances. By depriving the defendants of the benefits of such cross-examination in this case, error was committed which is ground for granting a new trial, as a thorough cross-examination is a matter or right in such instances. That these rulings were prejudicially erroneous is also fully sustained by *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617, and cases therein cited.

The declarations and acts of third persons were permitted to be shown when not made or done in the presence of the defendants. The state now claims that such evidence was proper on the ground that such persons had entered into a conspiracy with the defendants to injure and annoy the complaining witness. Whether such acts and declarations were admissible in evidence depends on the fact whether such conspiracy had been shown, and the further fact whether the acts were in furtherance of the objects of the conspiracy. This court has recently considered this question, in an opinion by Justice Spalding, and exhaustively reviewed the authorities, and discussed the principles applicable to such evidence, and determined therein when such acts and declarations are admissible. In view of the fact that a new trial must be granted on another point, and in view of the fact that the abstract is only typewritten in this case, and that the briefs do not minutely refer to the evidence by page and folio where the evidence to substantiate the claim that a conspiracy was entered into is to be found, we do not deem

it advisable to determine whether such acts and declarations were admissible or not. On another trial, the case referred to (*State v. Moeller*, 20 N. D. 114, 126 N. W. 568) should be read, if such evidence is again offered, in order to determine its admissibility. We again caution attorneys that the rules of court should not be disregarded in respect to noting in the brief just where the evidence may be found that bears on the point of law or fact under discussion. By compliance with such rules, the work of the court will be greatly diminished.

Objections are also urged to certain testimony on behalf of the state, to the effect that the defendants sowed mustard seed on the complaining witness's land, which was in crop. It is claimed that this was permitting the state to prove the defendants guilty of a separate and independent crime. The contention is that it was showing malicious injury to the property of the complaining witness, and that it is brought within the statute making such acts punishable as malicious injuries. Section 9315, Rev. Codes 1905, provides that malicious injury to the real or personal property of another is a misdemeanor. Section 9330 provides that any malicious injury to standing crops is a misdemeanor. These sections are broad enough to cover the malicious sowing of mustard seed on cultivated land that is in crop. Conceding, therefore, that the evidence shows a violation of these provisions, it is necessary, in view of another trial, to determine whether it was error for the court to permit the state to show these matters as independent facts. The state's contention is that it was proper as showing a motive for the commission of the offense charged in the information, and also that it was proper as tending to show malice on the part of the defendants. So far as motive is concerned, it is a rule that other offenses may sometimes be shown to prove a motive for the commission of a crime for which the defendant is on trial, but proof of such other offenses is not received to show that the defendant committed the crime for which he is on trial, but as bearing only on the intent or motive or other matters known as exceptions to the rule that evidence of other crimes is inadmissible. Before such proof is admissible, however, it must tend to throw light on the defendant's motive for, or intent in, doing the acts complained of. The evidence must fairly tend to show a motive. That the commission of such other crime may possibly or remotely show a motive is not sufficient. As said in *Elliott on Evidence*, § 156: "This

rule should not be too broadly applied to let in matters that are too remote and collateral, and from which no fair inference can be drawn." This statement is pertinent to this case. The fact that the defendants sowed mustard seed in the complaining witness's crop does not tend to show a motive for the independent offense of maliciously poisoning his horses. The state claims also that proof of such other crime tends to show malice in the commission of the offense charged. What we have just said regarding proof of motive applies equally to the proof of malice.

The instructions to the jury in this case stated that maliciously exposing poison, with the intent that it might be taken by animals, would be administering the same under the said statute. In thus instructing the jury, there was error. The information contains simply an allegation that poisons were administered maliciously and feloniously. Under this allegation, proof of malicious acts by exposing poison with intent that it should be taken by animals was not relevant or admissible, and instructions on that provision of the statute should not have been given. The statute provides two independent ways by which the offense of poisoning animals may be committed, and an allegation of wilfully and maliciously administering poisons will not warrant proof of poisoning by any other method. If the statute simply provided that maliciously administering poison should be a misdemeanor, proof of placing or exposing poison with intent that it might be taken by animals would be held admissible, and such a placing would be deemed to be administering it; but in view of the language of the statute defining the offense, such is not the case.

Other errors are assigned, but in view of the fact that they will not, probably, arise on another trial, we refrain from deciding or discussing them.

For these reasons the judgment of the district court is reversed, a new trial granted, and the cause remanded for further proceedings, according to law. All concur.

C. H. BAKER v. THE CITY COUNCIL OF THE CITY OF LA MOURE, LaMoure, North Dakota; C. I. Hutchinson, Mayor of the City of LaMoure, LaMoure, North Dakota; C. M. Holbert, Auditor of the City of LaMoure, LaMoure, North Dakota; R. N. Cunningham, Treasurer of the City of LaMoure, LaMoure, North Dakota, and Gilbert W. Haggart.

(129 N. W. 464.)

**Municipal Corporations — Special Assessments — Injunctions.**

1. A real-estate owner, whose property is about to be assessed to pay for a sewer in an amount in excess of the sum justly due for that improvement, under a contract between the city and the contractor, may restrain the officers of the city from levying such assessment against his property.

**Municipal Corporations — Public Improvements — Approval of City Engineer — Special Assessments.**

2. Under §§ 2787 and 2800, Rev. Codes 1905, the certificate of the city engineer that the work has been completed in accordance with the contract is essential before the city officers can properly levy assessments against individual property for the payment of the cost of a sewer.

**Municipal Corporations — Construction of Sewers — Contract — Approval of City Engineer.**

3. Where a city and a contractor enter into a contract for the construction of a sewer, and said contract specifies that the work must be done to the satisfaction of the city engineer, such provision is binding upon the city and the contractor, and the city will be restrained from levying assessments against individual property, where the city engineer, in good faith, refuses to approve of the contractor's work.

**Municipal Corporations — Public Improvements — Special Assessments — Appointment of City Engineer — City Engineer's Approval.**

4. The fact that the supervising engineer was appointed by the council especially to superintend the building of a sewer, there being no city engineer, does not affect the question of the binding effect of the contract or the application of the statutes to that question.

Opinion filed December 16, 1910.

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Note.—Injunction to restrain the collection of illegal taxes, see note in 22 L.R.A. 699.

Appeal from the District Court of LaMoure county; *Burke, J.*

Action for a permanent injunction. Demurrer to complaint overruled. Defendants appeal.

Affirmed.

*S. G. Roberts* and *W. H. Hutchinson*, for appellants.

Engineer's failure to object as the work proceeds waives defects. *Siebert v. Roth*, 118 Wis. 250, 95 N. W. 118; *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327; *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136.

Plaintiff has no interest to entitle him to maintain this action. *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Wood v. Bangs*, 1 Dak. 186, 46 N. W. 586; *Newcomb v. Horton*, 18 Wis. 566; *State ex rel. Byrne v. Wilcox*, 11 N. D. 334, 91 N. W. 955.

Engineer's approval not essential to the certifying or giving notice to commission. *Beach, Mun. Corp.* § 1085, note 2.

Public officers will not be enjoined unless about to do an unconstitutional or unlawful act that injures plaintiff. *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202; 3 *Abbott, Mun. Corp.* pp. 2510, 2512, 2513, 2526 and note; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; 12 *Current Law*, 918.

Plaintiff cannot see work completed, warrants drawn and delivered, and then seek equitable relief. *Rev. Codes* 1905, § 2789; *Barker v. Omaha*, 16 Neb. 269, 20 N. W. 382; *Wood v. Bangs*, 1 Dak. 179, 46 N. W. 586.

Employed engineer is not a public official. 2 *Abbott, Mun. Corp.* p. 1655; *White v. Alameda*, 124 Cal. 95, 56 Pac. 795.

*John Knauf* and *C. S. Buck*, for respondent.

Failure to perform contract justifies injunction at the instance of a taxpayer. 28 *Cyc. Law & Proc.* p. 1048; *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979; *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726.

Statute and contract require the approval of the city engineer, and it is essential to the certification to the special assessment commission. *McGuire v. Rapid City*, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Gosnell v. Louisville*,

22 Ky. L. Rep. 365, 57 S. W. 476; Lamson v. Marshall, 133 Mich. 250, 95 N. W. 78; Omaha v. Hammond, 94 U. S. 98, 24 L. ed. 70; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127.

MORGAN, Ch. J. The complaint alleges the following facts: That on the 28th day of July, 1908, the city of LaMoure, through its council, entered into a contract in writing with the defendant Haggart, for the construction of a system of sewers in that city; that one C. M. Baker was, by said city council, appointed supervising engineer, and was to superintend the construction of said sewers under said contract; that he was appointed as such supervising engineer by reason of the fact that no city engineer had been previously appointed by the mayor as provided by statute; that he duly accepted such appointment, and as such supervising engineer performed all of the duties required of him under said contract and under the statute; that he filed, with the auditor of the city, a final estimate and report on said sewer system, and said final report was by the said city council referred to a committee for action thereon; that said committee reported to the council, and its report was adopted by said council on April 25, 1909; in this report the committee recommended that portions of the sewers as constructed by defendant be reconstructed, inasmuch as they were defectively constructed; that on the 21st day of May, 1909, said committee made another report to the city council, in which it recommended the acceptance of the sewers as constructed by the defendant Haggart, under the contract, and that he be paid the balance due him in full, less the sum of \$150, to be reserved by the city for the purpose of placing the streets in proper condition; that the city council, by resolution, adopted said report, and ordered that warrants be issued in accordance therewith, and that the auditor did issue warrants in favor of said Haggart, pursuant to said resolution, for the sum of \$3,789.80.

The complaint further alleges that said supervising engineer has never approved the construction of the sewers, but, on the contrary, has specifically disapproved portions of the work done by him under the contract, and, in consequence of these facts, the contract has never been fully performed or completed, and that warrants were issued for such work in a sum largely in excess of the work actually done by said defendant Haggart.

The complaint also contains the following allegations: "That the said Gilbert W. Haggart has not, nor has anyone on his behalf, rebuilt those portions of said sewer system disapproved by the said supervising engineer in his report of December 11, 1908; that the said Gilbert W. Haggart has not, nor has anyone on his behalf, put the streets of the city of LaMoure, North Dakota, along which was constructed the sewer system specified in the contract mentioned in paragraph 3 of this complaint, in the same condition as they were before the construction of said system; that, by reason of the wrongful and unlawful action of the city council of the city of LaMoure in approving and accepting the contract and work done by the defendant Gilbert W. Haggart, after the same had been specifically disapproved by the supervising engineer, appointed by the said city council of the city of LaMoure to supervise the construction of said sewer, or certifying of the cost of that portion of the sewer disapproved by said supervising engineer, certifying the cost of putting the streets of the city of LaMoure in condition, to the special assessment commission, by the city auditor, would result in assessing an illegal tax against the property of the plaintiff, and work a special damage to the plaintiff, in that said portion of the tax levied by said special assessment commission would be an illegal lien on the plaintiff's aforesaid property."

The prayer of the complaint is that the city council be restrained and perpetually enjoined from certifying to the special assessment commission the cost of said sewer system, for the purpose of levying the special assessment for the cost of said sewers.

The defendants demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants have appealed from the order overruling the same.

It is first claimed that the plaintiff has shown no such interest in the result of the levying of assessments to pay for the sewer improvements as entitled him to relief in a court of equity. In this regard the complaint alleges that the plaintiff is a "resident property owner and taxpayer of the city of LaMoure, . . . and that he owns property and lots abutting on certain streets in the city of LaMoure . . . along which streets has been constructed the sewer hereinafter described, and that said property and lots are subject to assessments by

the special assessment commission, for the purpose of paying for the construction of said sewer above and hereinafter mentioned."

This allegation, in connection with the statements from the complaint quoted above, to the effect that the proposed assessment against the plaintiff's property would be illegal, is sufficient to show that the plaintiff has such interest in the contract as entitles him to the interposition of a court of equity. If not restrained, plaintiff's property would be encumbered by a lien in excess of what it would be if the council had not exceeded its authority. *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726; *McCain v. DeMoines*, 128 Iowa, 331, 103 N. W. 979.

It is claimed that the complaint does not show that any assessment will be made against plaintiff's property to secure the payment of the said sum of \$3,017.30. The complaint shows that warrants have been issued for that amount, and there is no provision for the payment of such warrants except through assessments against the lots abutting on streets where the sewers are constructed. The plaintiff alleges that he owns such lots. No conclusion can be drawn from these allegations, except that these lots will be burdened with a lien for such excess. The fact that plaintiff's lots are not specifically described in the complaint is not material.

It is also claimed that the complaint fails to show that the work was not done in the good and workmanlike manner called for by the contract. The allegation of the complaint above set forth shows that the sewer has not yet been constructed in accordance with the contract. These defects are specifically pointed out in the report of the engineer. Furthermore the contract provides that the sewer was to be built "to the satisfaction of the engineer selected." Under the terms of the contract, and under §§ 2784 and 2800, Rev. Codes 1905, the approval of the engineer is necessary before the final action by the city council. The contract provides that the work shall be done "in good, workmanlike, and substantial manner, to the satisfaction and direction of the engineer to be selected by the said party of the second part, who shall have general supervision of all and each part of the said work to be testified by a certificate under the hand of the said engineer."

Section 2784, *supra*, provides that "such contract shall require the work to be done thereunder to be done pursuant to the plans and speci-



fications therefor on file in the office of the city auditor . . . and subject to the approval of the city engineer, who shall personally supervise and inspect such work during its progress."

Section 2800, *supra*, provides: "Whenever the work for which a special assessment shall be required to be made by such commission shall have been completed, and approved by the city engineer, and the total cost of such work shall have been ascertained as near as practicable, the city auditor shall notify the chairman of such commission of the completion of such work," etc.

From the contract and these statutes, it is plain that approval by the engineer is intended as a prerequisite to final action by the council. The statutes were enacted to protect property holders from having to pay for poor work or materials, and from other abuses in public work liable to escape detection by those not specially informed on such matters. Engineers are supposed to have special training in such matters, hence the importance attached to their approval both in the statute and in the contract under consideration.

There is no question raised in this case as to the good faith of the engineer. The authorities make an exception as to a certificate by the engineer being necessary, if it is shown that the action of the engineer is arbitrary, fraudulent, or unreasonable. 28 Cyc. Law & Proc. 1049, and cases cited. *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.

The complaint and exhibits attached thereto and made a part thereof show wherein the sewers were not constructed in accordance with the contract, which provided that they were to be constructed in a good and workmanlike manner. In his report, the city engineer specifically disapproves of the work of the contractor, and states that the contract price should be reduced as to 10-inch pipes in the sum of \$3,017.30. The complaint also shows other defects, and that the city engineer specifically disapproved the work and recommended a deduction from the contract price in a sum in all amounting to \$4,389.80. These allegations refute, so far as the demurrer to the complaint is concerned, any contention that the refusal of the engineer to approve the work was arbitrary and unreasonable. We are now only determining whether the complaint states a cause of action as against demurrer. We are not determining that to refuse to approve of the work under the contract, for

the reason that the sewers were not constructed so as to come within what is known as the light test, was arbitrary. We are not passing upon the question whether the light test is a proper method of determining that the construction of the sewer was not in a good and workmanlike manner, because it does not comply with the light test. If the action of the engineer was arbitrary, the council would not be bound thereby; but the complaint and exhibits cannot justly be said to show an arbitrary refusal to approve of the work, as a matter of law.

The fact that the supervising engineer in this case was appointed by the council especially for the work, for the reason that there was no regular city engineer, has no force to change the binding effect of the contract that the engineer's approval was necessary, or as to the application of §§ 2787 and 2800, *supra*, to such contracts. The statute provides that when there is no city engineer the council shall employ one.

In *McGuire v. Rapid City*, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706, the effect to be given to a certificate of approval of a city engineer under a contract very much the same as the one in question was considered, and the court said: "By its terms, the plaintiff was to perform the work under direction of the city engineer, and to his satisfaction. The city made the engineer its agent to approve and accept the work. His judgment was the judgment of the city, and the plaintiff was only required to perform the work in such a manner as to meet with his approval. It is true that the contract does provide that the work was to be done in a 'good, workmanlike, and substantial manner,' but whether it was so done or not was to be determined by the engineer himself. The plaintiff and defendant contracted that the work must pass the inspection of the defendant's engineer; and though a court and jury, or other competent tribunal, might be satisfied that the work was done in a good, workmanlike, and substantial manner, yet it would not avail the plaintiff under this contract, unless, perhaps, the engineer should fraudulently or wrongfully withhold his approval."

The complaint states a cause of action, and the demurrer was properly overruled.

Order affirmed, CARMODY, J., concurring specially, SPALDING, J., dissenting.

CARMODY, J. (concurring specially). I concur in the result reached in the majority opinion, but deem it proper to express my views upon the reasons given by the supervising engineer for refusing to approve of a portion of the sewer. He disapproves of about 2,743 feet of the 10-inch pipe sewer, because it does not stand the light test, in other words, because a light cannot be seen from manhole to manhole. The plans and specifications nowhere call for the light test, and the supervising engineer does not claim that they do, but bases his refusal to approve of that part of the work that will not stand the light test, on the authority of a text-book on Sewers, by Professor Ogden, of Cornell University. The supervising engineer admits that water flows freely through that portion of the sewer disapproved of, and does not claim that the work is not in accordance with the plans and specifications, but bases his refusal to approve wholly on the light test. The supervising engineer cannot arbitrarily or unreasonably withhold his approval of the work. There is no pretense but that the work was done in accordance with the plans and specifications, except that a 24-foot back pressure gate valve to be placed at the river has not been furnished, also that the surface of the streets was not left in as good condition as it was before the commencement of the work. I think the supervising engineer in withholding his approval of the 2,743 feet of sewer on account of its failure to stand the light test is arbitrary and unreasonable, but as the contractor did not furnish the 24-foot back pressure gate valve, and left the surface of the streets in a rough condition, the plaintiff is entitled to relief against paying for that portion of the work. Hence the demurrer was properly overruled.

SPAULDING, J. (dissenting). I have no dissent to enter as to most of the principles of law announced in the majority opinion. The due protection of property rights of citizens of cities from the ill-considered, careless, or corrupt action of city councils requires that statutes granting them powers in matters relating to municipal improvements for which property may be assessed shall be construed with at least reasonable strictness. However, it is well settled that courts will not hold to as strict a construction in actions commenced after the work has been done, as in those by which it is sought to enjoin the officials or others before work has been performed in the execution of the con-

tract. It is elementary that a complaint seeking to enjoin public officials from the performance of official acts must state facts showing affirmatively that the plaintiff is entitled to the relief demanded. It is equally elementary that, if the complaint does not show affirmatively the right to such relief, it is demurrable. In the case at bar it is clear to me that the complaint wholly fails to show the plaintiff entitled to the relief demanded, but that if it does show him entitled to any of the relief demanded, it is only a trifling part of the subject-matter of the controversy.

It appears, from the complaint, that a contract was entered into for the construction of a system of sewers for the city of LaMoure, and that the city was districted for that purpose. The contractor proceeded with the work, and, in accordance with the terms of the contract, was from time to time paid by warrant an amount equaling 80 or 90 per cent of the contract price, and the warrants against which this proceeding is directed are for the balance claimed to be due him on the whole system. The complaint utterly fails to show that the property of the plaintiff which is claimed to be affected or liable to a special assessment is located within any district in which the sewer, as constructed, failed to meet the approval of the city engineer, also fails to show that the warrants in question were drawn for the work which he condemned. For all that appears in the complaint, they may have been drawn for that part of the sewer system which was approved. If drawn in payment of the disapproved part of the sewer system, and that portion was in another district than that in which the property of the plaintiff is situated, he has no cause of action. It would not effect his property, hence I conclude that the complaint fails to state a cause of action in behalf of the plaintiff. Of course if the complaint showed the whole city to have been included in one district, a different question would arise, but it is clear that the complaint shows neither that his property is to be assessed to pay for that part of the sewer disapproved, nor that the warrants against which the complaint is directed were drawn for the condemned portion of the sewer system. The allegation that his property will be affected is a mere conclusion of law, unsupported by facts pleaded.

However, if in this respect the complaint is sufficient, it is insufficient and fails to state a cause of action as to the main part of the

warrants in question, and I think the court, even if sustaining the complaint technically because showing a cause of action as to \$150, or any portion of the warrants, should announce the law regarding the really important part of the controversy. The sole ground on which the injunction is sought is that a minor portion of the system, as constructed, did not meet with the approval of the supervising engineer. Had he declined to approve it, and stopped there, this contention might be sustained, but he specifies his reason for withholding his approval, and the complaint must state facts bringing the case within the reason specified. The authorities cited in the majority opinion allowed that his certificate of approval is not necessary when it is shown that his action is arbitrary, fraudulent, or unreasonable. It is plain to me that the reason given for withholding his approval in the case at bar is wholly arbitrary, and one not contemplated by the contract. The contract entered into between the contractor and the city of LaMoure is made a part of the complaint, and it requires the work to be done and the sewer constructed in accordance with certain plans and specifications, also made a part of the complaint, as are the various reports of the engineer disapproving a portion of the work and giving reasons therefor, and the reason as applicable to practically all the work we are considering, comes squarely within the exceptions referred to by the authorities. Neither the contract nor the plans and specifications anywhere require the work to meet the light test, or to be construed so a light can be detected from one manhole to another, and the failure of a portion of the sewer to pass this test is the only reason given for withholding his approval by the engineer. His reports show that water flows freely through that part of the line disapproved, and that the fall is about 1 foot per hundred. He does not claim in his reports that the contract requires the work to pass such a test, but refers to the work of one Ogden as authority, holding that sewers ought to conform to that test. It is not contended that the materials differed from those specified in the contract, or that the work does not conform to the same and the plans and specifications, but that for about 2,743 feet of 10-inch pipe a light cannot be seen because of crooks in the line. For all that appears by the allegations of the complaint, the line may have turned several corners in this distance. If any inference can be drawn, it is that no such test was contemplated, for the reason that the bid included

a price for lamp holes, but the plans and specifications nowhere call for any. As far as shown by the complaint, the sewer constructed in this respect in accordance with the terms of the contract, and the reason for withholding his approval by the engineer, as plainly given, is wholly arbitrary, as relating to this contract. It may be a proper test to apply to sewers when called for by the contract, but it is not directed to the character of the workmanship or the quality of the material, but goes wholly to the plan of construction. This plan of construction was adopted by the city before the contract was let, and the contract, as I have shown, was let with reference to it, and not with reference to the opinion of some writer on systems of sewerage who never saw or heard of the contract in question. I have no doubt that any expert on sewerage systems could devise many methods of applying a test, or many different tests, any or all of which might be appropriately applied to a system if called for in the contract, and however unreasonable or exacting they might be if the work failed to pass the test when required by the contract to do so, the engineer would be warranted in disapproving the work. To make this complaint good in this respect, it was necessary to plead affirmatively that such a test was contemplated by the contract, and no allegations of the complaint can be properly construed as allowing this. On the contrary, the express allegations of the complaint establish the fact that the test suggested is one not contemplated, and was arbitrarily adopted by the engineer.

For these reasons I dissent.

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### IVA O. JENNESS v. S. H. CLARK.

(129 N. W. 357.)

#### **Schools and School Districts — County Superintendent — Constitutional Law.**

1. Sec. 764, Rev. Codes 1905, which prescribes that at each general election there shall be elected in each county a superintendent of school, whose term shall be two years "and until his successor is elected and qualified," is a constitutional and valid enactment.

**Schools and School Districts — County Superintendent — Candidate Ineligible.**

2. Following the rule announced in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, *held*, that under such statute the regularly elected incumbent of the office is entitled to hold the same until his successor is legally elected and qualified.

**Officers — Election of a Disqualified Person — Words and Phrases — “Elected” — Statutory Construction.**

3. A person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity. The word “elected,” as used in § 764, Rev. Codes 1905, signifies an election of a qualified successor to the incumbent.

**Officers — Right to Hold Over — Waiver of Right to Office.**

4. The incumbent of a public office, who has the right to hold over until his successor is elected and qualified, has such a special interest as enables him to maintain an action under the provisions of chap. 25, Code Civ. Proc. (§§ 7349 et seq., Rev. Codes 1905) against one who intrudes himself into such office, unless such right has been lost or waived in some manner either by the voluntary surrender of the office or by some other equivalent act.

Opinion filed December 21, 1910.

Appeal from District Court, Oliver county; *W. C. Crawford, J.*

From a judgment in defendant's favor, plaintiff appeals.

Reversed.

*Hyland & Nuessle*, for appellant.

Candidate for county superintendent must hold certificate of highest county grade. Sec. 150 N. D. Const. Rev. Codes 1905, § 778; Laws of 1907, chap. 95; *Taylor v. Sullivan*, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802.

A county superintendent can hold the office until a duly qualified successor is elected and qualified. Section 764, Revised Codes 1905; *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74; *Taylor v. Sullivan*, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; *Richards v. McMillin*, 36 Neb. 352, 54 N. W. 566; *State ex rel. Hogle v. Smith*, 94 Iowa, 616, 63 N. W. 453; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *Kimberlin v. State*, 130 Ind. 120, 14 L.R.A. 858, 30 Am. St. Rep. 208, 29 N. E. 773; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *People ex rel. Baird v. Tilton*, 37 Cal. 614; *Johnson v. Mann*, 77 Va. 265; *State v. Gormley*, 53 Wash. 543, 102 Pac. 435, 104 Pac. 620.

Election of a disqualified person is a nullity. *Sheridan v. St. Louis*, 2 A. & E. Ann. Cas. 480, and note, and cases cited, 183 Mo. 25, 81 S. W. 1082.

An officer entitled to hold until a lawful successor is elected and qualified can maintain an action to determine such successor's right. *State ex rel. Bickford v. Fabrick*, 18 N. D. 94, 112 N. W. 74; *Taylor v. Sullivan*, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; 15 Cyc. Law & Proc. p. 403.

Surrender to a writ of mandamus does not waive right to office. *Seifen v. Racine*, 129 Wis. 343, 109 N. W. 72; *State ex rel. McGuyer v. Huff*, 172 Ind. 1, 87 N. E. 141; *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159.

*Reimestad & McCormick*, for respondent.

Where the Constitution fixes the term of an office, the legislature cannot lengthen or shorten it. N. D. Const. § 150; *Throop*, Pub. Off. §§ 305, 326, pp. 310, 327; *Mechem*, Pub. Off. § 387, p. 254; 23 Am. & Eng. Enc. Law, 2d ed. pp. 406, 407; *State ex rel. Wood v. Sheldon*, 8 S. D. 525, 67 N. W. 613; *State ex rel. Atty. Gen. v. Brewster*, 44 Ohio St. 589, 9 N. E. 849; *People ex rel. Morton v. Tieman*, 8 Abb. Pr. 359; *Badger v. United States*, 93 U. S. 599, 23 L. ed. 991.

State only can bring quo warranto under facts of this case. *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025.

Appellant, having surrendered the office, has no special interest to warrant this action. 23 Am. & Eng. Enc. Law, 2d ed. p. 417; *People ex rel. Drew v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

Election of an unqualified person does not seat his defeated opponent. 10 Am. & Eng. Enc. Law, 2d ed. p. 758; *McCrary*, Elections, 4th ed. § 330; *Saunders v. Haynes*, 13 Cal. 145; *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 A. & E. Ann. Cas. 480.

**FISK, J.** Appellant brought this action under the provisions of chapter 25, Code of Civil Procedure (Rev. Codes 1905, §§ 7349 et seq.), to try title to the office of superintendent of schools of Oliver county. Defendant demurred to the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action, which demurrer was sustained, and plaintiff electing to stand on the complaint, judgment in defendant's favor was entered, from which



judgment this appeal is prosecuted. The ground on which the trial court sustained such demurrer is not disclosed, but the contentions of respondent, briefly stated, are that the complaint fails to state a cause of action, because it discloses that appellant's term of office as such superintendent expired on the first Monday of January, 1909, and that respondent, who was the successful candidate for such office at the preceding general election, and to whom was issued a certificate of election in due form, duly qualified within the time required by law, and at the time this action was commenced was in the possession of such office, discharging the duties thereof. Hence that appellant has no such special interest in the office as will permit her to maintain this proceeding, even admitting the ineligibility of respondent to hold the office. It is also asserted that because the complaint discloses that appellant surrendered such office to respondent, that it affirmatively appears therefrom that she has ceased to have such a special interest therein as will enable her to maintain the proceeding. The complaint need not be set forth, as its alleged insufficiency is apparently conceded to depend upon the soundness of one or more of the legal propositions advanced by respondent's counsel. To my mind the most serious question on this appeal is embraced in respondent's second contention, which is in effect that a successor to the plaintiff, in the person of respondent, has been elected and has duly qualified, and therefore plaintiff's right to the office was thereby terminated. The demurrer, of course, admits respondent's ineligibility to hold the office as alleged. In the light of such admission, can it be said that a successor to plaintiff has been elected and qualified so as to terminate her right to the office?

Appellant's counsel contend that, because of respondent's ineligibility to hold the office, his election was void, and that consequently plaintiff's right to the office still continues, and will continue until a qualified person has been elected and has qualified. That such election was void, we entertain no doubt. Such is practically the unanimous voice of the authorities. 23 Am. & Eng. Enc. Law, 2d ed. p. 338 and cases cited; *Sheridan v. St. Louis*, 2 A. & E. Ann. Cas. 480, and cases cited in note on page 485 (183 Mo. 25, 81 S. W. 1082). The election being a nullity, it inevitably follows, assuming the constitutionality of § 764, Rev. Codes 1905, which we will hereafter consider, that appellant is entitled to continue in the office until such time as her suc-

cessor shall be elected and qualified, unless by some act on her part she has relinquished her right thereto. This court in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, expressly so held, citing numerous authorities. Our sister state of Minnesota has likewise so held. *Taylor v. Sullivan*, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802. Respondent's counsel contend that appellant, in her amended complaint, admits that respondent was *duly elected* and has duly qualified; but we do not thus construe such pleading. On the contrary such complaint expressly alleges facts showing respondent's ineligibility to hold the office at all times mentioned therein. If he was ineligible, as the demurrer admits, then, as we have above decided, no election took place, as the same was a nullity. Respondent's ingenious argument regarding the meaning of the word "qualified," as used in the statute, is somewhat misleading, in that it assumes that his right to the office was alone dependent upon the act of qualifying. It is no doubt true, as argued by counsel, that the meaning of the word "qualified," as thus used, merely refers to the taking of the required oath of office and giving an official bond as required by statute where that is necessary. Something more than the act of *qualifying* is required, however, to entitle respondent to the office. He must have first been *elected* thereto.

We will determine the question whether § 764, Rev. Codes aforesaid is constitutional. This section is as follows: "There shall be elected in each organized county, at the same time other county officers are elected, a county superintendent of schools, whose term of office shall be two years, commencing on the first Monday in January following his election, and until his successor is elected and qualified. . . ." Respondent's counsel contends that this section violates § 150 of the Constitution, which reads: "A superintendent of schools for each county shall be elected every two years, whose qualifications, duties, powers, and compensation shall be fixed by law." It is argued by respondent's counsel that such constitutional provision clearly fixes the term at two years, and hence the legislature is powerless to provide that the incumbent of the office may hold until his successor is elected and qualified. Among other things they say: "The intention of the framers of the Constitution is clearly indicated, because under § 173 those county officers whom the framers of the Constitution intended should

hold over are specifically named and authorized to hold over." We attach no significance to this fact. The office of county superintendent was evidently omitted from § 173, in order that the legislature might be left free to provide for the election of such officer at a time other than the general election. We do not construe § 150 as evidencing any intent on the part of the framers of the Constitution to do more than merely provide for the biennial election of such officer, leaving it to the legislature to provide when such election shall be held and when the term shall commence and end. There is nothing therein contained from which it can be legitimately argued that it was the intention to deprive the legislature of the power to provide against vacancies in such office. We think the decision in *State ex rel. Bickford v. Fabrick* is unquestionably sound, to the effect that the incumbent of such office is entitled to hold the same until his successor is duly elected and qualified. The word "elected," as used in provisions of this nature, signifies an election of a qualified successor to the incumbent. 23 Am. & Eng. Enc. Law, p. 415.

It follows from what we have above held that plaintiff has such a special interest as will enable her to maintain this proceeding. See *Taylor v. Sullivan*, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802, and cases cited; also 15 Cyc. Law & Proc. pp. 403, 404; *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198. Respondent's counsel cite and rely on *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025, as holding that plaintiff has not such a special interest as will enable her to maintain the action, but such decision was under §§ 5345 et seq., Compiled Laws 1887, which vastly differ from § 7351, Rev. Codes 1905, under which the case at bar was instituted. The latter section expressly provides that a person having a special interest may maintain such action, and such was the decision in *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590.

But it is contended by respondent's counsel that plaintiff surrendered the office to respondent, and by so doing she ceased to have any further special interest entitling her to maintain the proceeding. It is no doubt true that if plaintiff voluntarily turned such office over to defendant, she cannot bring the action. Such is the rule announced in 29 Cyc. Law & Proc. p. 1418, citing *State ex rel. Worrell v. Peelle*, 124 Ind. 515, 8 L.R.A. 228, 24 N. E. 440; *State ex rel. Birkhauser v. Moores*,

52 Neb. 634, 72 N. W. 1056; *State ex rel. Thayer v. Boyd*, 34 Neb. 435, 51 N. W. 964. Such is no doubt the correct rule, but it has no application to the facts in the case at bar. The plaintiff at all times asserted her right to the office, and refused to surrender the same until commanded so to do by a writ issued by the district court, whereupon she immediately instituted this action. Under these facts it cannot properly be urged that she has in any way surrendered or waived her right to the office. As supporting these views, see *Seifen v. Racine*, 129 Wis. 343, 109 N. W. 72; *State ex rel. McGuyer v. Huff*, 172 Ind. 1, 87 N. E. 141; *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159. In this connection it should be remembered that plaintiff is not here seeking to assert any right to the office except as a holdover incumbent thereof.

It nowhere appears that she was a candidate for re-election at the general election in 1908. The case of *People ex rel. Drew v. Rogers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, relied on by respondent's counsel, has no application to the facts in the case at bar, and does not support their contention. There the relator had voluntarily surrendered the office to another on the supposition that the latter had been duly elected and was entitled thereto. Subsequently a citizen and third party successfully contested such election, on the ground of the ineligibility of such incumbent to hold the same. After such election was adjudged void a vacancy was declared, and defendant was appointed to fill the same. Thereafter relator, the former incumbent, sought to regain possession of the office which he had previously voluntarily surrendered, and it was very properly held that he could not recover.

Respondent's last contention is devoid of merit. It is based upon the false assumption that plaintiff was a defeated candidate at the 1908 election. No such fact is disclosed by the record. But conceding such to be the fact, a complete answer to such contention is the fact that plaintiff asserts no right under such election, but, as before stated, she bases her right to recover upon the fact that her successor has not been elected and that she is entitled to hold over until such event takes place.

For the above reasons the demurrer was improperly sustained, and the judgment must be reversed and the cause remanded for further proceeding according to law.

## IN THE MATTER OF THE PROCEEDINGS FOR THE DISBARMENT OF WILLIAM MALONEY, an Attorney at Law.

(129 N. W. 74.)

**Attorney at Law — Disbarment Proceedings — Sufficiency of Evidence.**

1. *Held*: That the findings of the trial court in favor of the accused on certain charges are sustained by a preponderance of the evidence, but the charge that he has been guilty of disrespect to the court in connection with proceedings in a certain transaction set out in the evidence is not supported by any evidence regarding that transaction.

2. *Held*: further, that the charge of attempting to deceive the court in violation of his duty as an attorney is not sustained by that degree of clearness which justifies the court in suspending an attorney, particularly in view of the accused's explanation of the transaction and the absence of evidence in direct conflict with his version.

Opinion filed December 21, 1910.

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Note.—Judge's neglect for years to decide disbarment case does not preclude his successor passing upon and basing a decision on same facts and matters occurring later. *Re Crum*, 7 N. D. 316, 75 N. W. 257. Disbarment proceedings must be tried upon testimony of witnesses, not their affidavits, to save accused's right of cross-examination. *Re Simpson*, 9 N. D. 379, 83 N. W. 541. Proceedings under the statute to suspend, or revoke an attorney's license, is not criminal in its procedure. *State v. Root*, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590; *Re Crum*, *supra*; *Re Kirby*, 10 S. D. 416, 73 N. W. 908. Proceedings for disbarment and contempt cannot be united. *State v. Root*, *supra*. Courts, having the power to admit an attorney, have inherently the power to disbar. *Re Simpson*, *supra*. May disbar for misconduct in any court, state, Federal, trial, or appellate. *Ibid*. While disbarment proceedings may be instituted in the supreme court, they should arise in the district courts, unless the offense complained of occurred in the supreme court or arose out of its order. *Re Freerks*, 11 N. D. 120, 90 N. W. 265. Misconduct that warrants suspension. *Ibid*.; *State v. Root*; *Re Simpson*; and *Re Crum*, *supra*. False statement to another attorney in court as to the whereabouts of a paper, and that he removed it from the court files, innocently, is not false statement to a court authorizing disbarment. *Re Eaton*, 4 N. D. 514, 62 N. W. 597. May be disbarred for his misconduct as state's attorney, although there is no accusation against him as attorney as to private professional conduct. *Re Voss*, 11 N. D. 540, 9 N. W. 15; *Re Simpson*, *supra*. Concealing his disbarment in another state, representing himself as a practitioner of that state, while so disbarred, warrants his disbarment in this state. *Re Olmstead*, 11 N. D. 306, 91 N.

Appeal from the District Court of Williams county from a judgment suspending William Maloney from the practice of law for ninety days and requiring him to make application and proof of compliance with the judgment of suspension before he can be reinstated; *Burr*, Special Judge.

Reversed.

*William Maloney*, in *pro per*.

*A. J. Bessie*, *Edwin A. Palmer*, and *Frank Fisk*, for respondent.

SPALDING, J. This is an appeal from a judgment of the district court of Williams county suspending William Maloney, of Wheelock, in said county, a member of the bar of this state, from the practice of law in all the courts of the state for a period of three months, and providing that after the expiration of such three months, upon proper application and notice to the prosecuting committee and due proof of

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W. 943. Proofs that accused has reformed as result of his discipline, and is now of good moral character, and trustworthy, that his misconduct was the result of youthful indiscretion and radical misconception of duty, will warrant reinstatement of a disbarred attorney. *Re Simpson*, *supra*, and *Re Egan*, — S. D. —, 129 N. W. 365. Acts of partner of accused, not participated in by the latter, do not warrant a disbarment. *Re Whittemore*, 14 N. D. 487, 105 N. W. 232. On dissolution of a law firm by disbarment of a member, contracts may be completed by the remaining partners, and existing contracts for services will be determined under existing partnership contracts. *Bessie v. Northern P. R. Co.* 14 N. D. 614, 105 N. W. 936. Procuring all of the property of a mentally incompetent client, is ground for disbarment. *Re Egan*, 22 S. D. 355, 117 N. W. 874. Right to disbar inherent in courts, regardless of statute, and statutory grounds do not exclude others. *Id.* Criticism of judicial officers after the termination of a case, no grounds for disbarment. *Re Egan*, 24 S. D. 301, 123 N. W. 478. Good moral character to warrant reinstatement not shown. *Id.* A state's attorney being concerned in a civil action based on facts upon which he must prosecute criminally, such conduct being forbidden by law, cannot plead ignorance of the statute in defense of disbarment proceedings. *Re Schull*, 25 S. D. 602, 127 N. W. 541. Attempt to corrupt a witness in case being tried by an attorney is ground for his disbarment. *Re Harben*, — S. D. —, 129 N. W. 561. Disbarment takes away all privileges of an attorney,—precludes his practice in all courts. *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021. Election as state's attorney after disbarment does not reinstate him. *Ibid.* One proceeded against for disbarment, cannot plead that the acts of which he was accused were done three days before his admission to practice. *Re Elliott*, 18 S. D. 264, 100 N. W. 431. Certain other acts warranting a disbarment. *Id.*

compliance with the judgment of suspension, he may be reinstated. The period of suspension has more than elapsed, but the judgment relating to proof of compliance with the order is still in force, and appellant insists that if the findings and judgment of the trial court are not sustained by the record, he has the right to practise law without being subject to the burden of making such application and proof.

Complaint was made to the judge of the eighth district, and accusations in writing were filed against the respondent with the clerk of the district court of Williams county, and were ordered served upon the appellant, who was required to file his verified answer to such accusations. Frank Fisk, Aaron J. Bessie, and E. A. Palmer, members of the bar of Williams county, were appointed to prosecute the charges. Appellant answered by way of general denial, and, on his filing an affidavit of prejudice against Honorable E. B. Goss, judge of the eighth district, Honorable A. G. Burr, judge of the ninth district, was called in and presided at the hearing of such charge. We need not rehearse the separate charges. It suffices to say the court found the first and second not sustained by the evidence; the charge of being guilty of wilful violation of his duty as an attorney and counselor in seeking to mislead the judge of that court, by means of artifice and fraud, for the purpose of gaining an advantage, sustained by competent evidence, and the charge of being guilty of failing to maintain the respect due to courts of justice of the state, sustained by competent evidence so far as involved in the third charge, but not in other respects. We shall not review the findings of the trial court on the charges found unsustained, further than to say that we are satisfied that the trial court was justified in so finding. The evidence on these charges was conflicting, and we are impressed with the belief that the accusations were not sustained by a preponderance of the evidence. We say this without deciding that we have the power of review of charges on which the trial court has acquitted appellant. As to the finding that he had failed to maintain the respect due to courts of this state, as shown by the evidence taken, as involved in the third charge, we have very carefully considered the same. Neither the findings nor the briefs point out the particular respects in which the court found defendant had been guilty of violating this duty of an attorney, and we are unable to determine on what evidence this finding is predicated. We therefore hold that the court

was in error as to that finding. Did this finding not specify the third charge, we might be able to sustain it, although there is a serious conflict in the evidence directed to that point in connection with other things.

As to the finding that appellant had been guilty of wilful violation of the duty of an attorney and counselor in seeking to mislead a judge of the court by means of artifice and fraud, etc., a majority of this court concludes that the finding is not sustained by that certainty necessary to warrant the judgment of suspension.

Briefly, the facts in connection with the accusation on that subject were that one Stewart and wife had sustained a loss by fire destroying property insured for \$1,500. They were indebted to one Doughty, an attorney, for services rendered, amounting to \$350. The fire loss was adjusted at \$962.50 or thereabouts, and by an instrument in writing duly executed, Stewart and wife assigned the policy before payment to appellant, he agreeing to pay them therefor 90 per cent of the value of the policy. Doughty commenced an action against the Stewarts as debtors and the Insurance Company and appellant as garnishee defendants. Service was made and, by arrangement, the proceeds of the policy were deposited in court to relieve the insurance company of further liability. Appellant, as garnishee defendant, answered denying all liability to the Stewarts. Subsequently he and Doughty entered into a stipulation that there was due the Stewarts \$175, and Doughty stipulated to release all claim to the remainder of the insurance money. The proceedings relating to this matter, which are quite complex, need not be recited in detail, but they furnish the basis of the charge of attempting to deceive the court. Maloney's contention is that the stipulation admitting on his part that \$175 was due the Stewarts was not intended as an admission of that fact, or of the untruthfulness of his answer as garnishee defendant, or of his contention throughout the course of the proceedings, but that it was made by reason of Doughty suggesting that he would rather accept \$175 in full, than to have litigation over his fees as an attorney, and that thereupon appellant told Doughty he would stipulate that there was that much due, and did so accordingly. It is claimed to be simply the exercise of the right to buy his peace, an admission made solely for the purpose of settling the controversy. On the hearing of the accusations, voluminous evi-



dence was introduced with reference to this transaction. Appellant undertook to show that he had at no time been indebted to the Stewarts after the commencement of the garnishment proceedings, by showing charges for services against them in numerous matters which he claims he had been employed to attend to as attorney, and which were unpaid. He kept no books. After reviewing his testimony, it is far from satisfactory as to his claims. In cold type it reads very much as though the major portion of his charges against the Stewarts were the result of an afterthought, and made to support his denial of liability, but in the absence of testimony in conflict with his version of the affair, we do not feel justified in upholding the judgment.

We deem it proper to remark that the record in this case, although we find in appellant's favor, discloses methods employed by him of seeking and obtaining legal business and of dealing with clients, which is highly reprehensible, and which would not be pursued by an attorney having a proper appreciation of the ethics of his profession and the duties owing clients and litigants. No member of the community is charged with the exercise of a higher degree of good faith, fairness, and honesty in his dealings with others and in his treatment of clients, than an attorney at law. He is an officer of the court, and should be possessed of a high appreciation of ethical and moral duties, and we trust that the accused may hereafter appreciate them more fully than he appears to have done in the past. The argument contained in his brief is very largely composed of highly improper reflections upon the judge ordering the hearing and the judge who presided, all of which is unwarranted, as we believe, and certainly is not justified by anything contained in the record before us.

The judgment of suspension is reversed, without costs. All concur.

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## STATE OF NORTH DAKOTA v. JOSEPH WINBAUER.

(129 N. W. 97.)

### **Criminal Law — Indictment and Information — Preliminary Examination — Necessity.**

1. A preliminary examination before a committing magistrate, or a waiver  
21 N. D.—11.

thereof, is necessary before the filing of an information in the district court on the charge of committing an offense against the criminal laws of the state, unless such offense is charged to have been committed during the continuance of a term of such court, barring the exceptional cases enumerated in § 9791, Rev. Codes 1905.

**Criminal Law — Indictment and Information — Motion to Set Aside.**

2. On the arraignment of a person charged by information only with having committed a criminal offense when a term of the district court was not in continuance, and not included in the exceptions referred to, the proper procedure is by motion to set aside the information.

**Criminal Law — Indictment and Information — Preliminary Examination — Failure to Grant.**

3. January 12, 1910, the defendant waived a preliminary examination before a magistrate on a complaint charging him with keeping and maintaining a common nuisance in violation of the prohibition law, at divers and sundry times since the 1st day of July, 1909, in certain described premises, and was held to the district court on such charge. May 5, 1910, an information was filed in district court during a term which commenced May 3, 1910, charging the same person with keeping and maintaining a common nuisance in the same premises described in the complaint, on the 1st day of July, 1909, and from thence continually to and including the 2d day of May, 1910. *Held:* that the complaint and the information charged two distinct offenses, and that the 2d day of May, 1910, not having been during the continuance of a term of the district court, the information should have been set aside on motion made, on the ground that the defendant had neither had nor waived a preliminary examination as to the offense charged in the information.

Opinion filed December 21, 1910.

Appeal from District Court, Morton county; *Crawford, J.*

Joseph Winbauer was convicted of maintaining a common nuisance in violation of the prohibition law, and he appeals.

Reversed and remanded.

*Shaw & Nuchols*, for appellant.

*J. M. Hanley*, State's Attorney, *Andrew Miller*, Attorney General, and *Alfred Zuger*, Assistant Attorney General, for respondent.

SPALDING, J. This is an appeal from a judgment of conviction of the defendant at the May, 1910, term of the district court of Morton county, of the offense of keeping and maintaining a public nuisance, contrary to the provisions of the so-called prohibitory law.

Neither the evidence nor the instructions of the court are before us. The motion to set aside the information disposes of the appeal. The motion was based upon the ground that the defendant had not had any preliminary examination before a magistrate as to any public offense charged in the information as having been committed since and subsequent to the 11th day of January, 1910, and had not waived such examination, and had never been held to answer before the district court for any offense alleged to have been committed by him since the 11th day of January, 1910. The motion was denied and proper exception taken. A verdict of guilty was returned on the 7th day of May, 1910, and on the 14th day of May the defendant was sentenced.

The history of the prosecution, as far as necessary to be here noted, is as follows: On the 12th day of January, 1910, the defendant was held to answer the charge of keeping and maintaining a common nuisance in certain premises in the city of Mandan, Morton county, North Dakota; the premises being duly described. The complaint on which he was so held charged the commission of the offense at divers and sundry times since the 1st day of July, 1909. On the 5th day of May, 1910, being a day of a regular term of the district court of Morton county, the state's attorney filed an information charging the defendant with maintaining a common nuisance, in the same premises described in the complaint, on the 1st day of July, 1909, and from thence continually to and including the 2d day of May, 1910, without any preliminary examination having been had as to the period between January 12, 1910, and May 2, 1910, inclusive. May 2d was not a day during the continuance of a term of the district court in Morton county; the court convened in regular term on the 3d day of May, 1910.

No constitutional provision is found in this state requiring a preliminary examination before filing an information in criminal proceedings, but § 9791, Rev. Codes 1905, provides as follows: "During each term of the district court held in and for any county or judicial subdivision in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county or judicial subdivision, or other person appointed by the court as provided by law to prosecute a criminal action, shall file an information, or informations, as the circumstances may require, respectively, against all persons accused of having committed a crime or public offense within such county or ju-

dicial subdivision, or triable therein. (1) When such person or persons have had a preliminary examination before a magistrate for such crime or public offense, and, from the evidence taken thereat, the magistrate has ordered that said person or persons be held to answer to the offense charged or some other crime or public offense disclosed by the evidence. (2) When the crime or public offense is committed during the continuance of the term of the district court in and for the county or judicial subdivision in which the offense is committed or triable." The remainder of the section is not applicable to the case at bar.

Prior to 1895, a preliminary examination was necessary in all cases. Hence former decisions of this court, based upon the right of a party to a preliminary examination before the filing of an information in the district court, are not in point. The appellant contends that the state, by filing the complaint before the committing magistrate, elected to consider and act upon the maintenance of the nuisance prior to January 12, 1910, as a completed offense, and that including in the information filed the 5th of May, 1910, additional time from January 11th to May 2d, is a material variance; that in effect the information, by the act of the state, is made to charge two separate offenses, for one only of which defendant has been held by the magistrate, and that the offense committed between January and May must be treated as constituting a separate and distinct offense for which the appellant cannot be placed on trial in the district court upon information, without first having been held by a magistrate; no portion of this period having been during the continuance of a term of the district court. On the other hand, the state contends that it is merely a variance in point of time, and is not material, and therefore not fatal on a motion to set aside the information; that such a variance, to be fatal, must go to the extent that another and different crime is charged in the information than that for which the accused had or waived his preliminary examination. If two offenses are charged, the face of the information does not disclose that fact; hence it is not demurrable. In the commission of a continuous nuisance, the time during which it continues is a material element of the offense. A conviction may be sustained for maintaining it upon one day, or on any or all the days, included in the period of time covered by the information; but when the state has elected to stand upon the charge that the offense has continued to and terminated

upon a certain day, then an information including not only the period of time anterior to the preliminary examination, but several months subsequent thereto, is open to the objection of materially varying from the original complaint, and the offense charged in the information becomes and is a different offense from that charged in the complaint. In the complaint, the offense charged is keeping a nuisance at divers and sundry times since the 1st day of July, 1909 (prior to January 12, 1910), while in the information the defendant is charged with keeping a nuisance continually between the 1st day of July, 1909, and the 2d day of May, 1910. Time is an essential element in the description of the offense, and the difference in the time covered made them charge two distinct offenses. In the case at bar, the appellant had no preliminary examination for the offense set out in the information. See *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, where it is held that an information charging an assault with a deadly weapon upon George Massino must be set aside upon motion, when the defendant was held by the committing magistrate upon a charge of assault with a deadly weapon upon one George Magin, as they are different offenses, and one is not included in the other. The information on its face does not disclose that two offenses are charged. In truth, the prosecution only attempted to charge one offense in that instrument, but, had no preliminary examination been held, the information would, without a question, have been set aside upon motion, and we do not understand how the fact that a preliminary examination was held for a material fraction of the time covered in the information, that fraction of time being long prior to the filing of the information, and the remaining portion not having been during the continuance of a term of the district court in that county, can help the case for the prosecution. On the face of the information, evidence was admissible of the commission of the offense at any time between the 1st day of July, 1909, and the 2d day of May, 1910, on authority of *State v. Dellaire*, 4 N. D. 312, 60 N. W. 988, and the whole proof might have gone to the commission of the offense subsequent to the preliminary examination and prior to the 3d day of May, 1910. The information, on its face, notified the defendant that he must prepare for trial upon the offense charged as having been committed on every day between July 1, 1909, and May 3, 1910, and when it is conceded that he could only be tried for that

portion of the period covered by the information which had elapsed prior to the 12th of January, 1909, then it is obvious that he would be likely to be misled and perplexed in preparing his defense. In *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, this court used this language: "It is clear from these provisions that, in filing an information, the state's attorney is not limited strictly to the offense named in the complaint. How far he may depart therefrom, we are not called upon to decide. To this extent we are clear. The state's attorney may file an information for any offense covered by the allegations in the complaint or growing out of the transaction therein set forth, or necessarily connected therewith, and of which the accused must know himself to be guilty if guilty of the matter charged in the complaint."

The offense in the case at bar was by name covered in the allegations of the complaint, but not as to the extent of its duration. It grew out of the transaction set forth in the complaint, in the sense that it was a continuing transaction or offense, but not so when the state has elected to proceed on the theory that the offense regarding which the complaint was filed terminated on the 11th day of January, 1910. An information could have been filed as to the offense previous to the date of the commitment, and if the defendant continued the nuisance after such date, he was guilty of the commission of a separate and independent offense of the same name and nature, but differing in the time during which it was committed. It does not grow out of the same transaction, in the sense that it was a necessary result thereof, or proceeded or took place as a consequence of the original offense, and it was not necessarily connected therewith, in the sense meant by this court in the case cited, and the knowledge of defendant that he was guilty of the offense, if he had such knowledge, during the time stated in the complaint, does not imply that he was guilty of a like offense subsequent to the preliminary examination. The next sentence of the opinion in the *Rozum Case*, succeeding the one which we have quoted, is in point: "The additional allegation covered no further criminal act nor criminal purpose on the part of the accused." This is one of the reasons on which the decision in that case rests, but in the case at bar the commission of the act, if committed by the accused, between the preliminary examination and the 3d day of May, was a further criminal act and evidenced a further criminal purpose on the part of the accused.

The submission of the motion to set aside the information on the grounds stated was the proper procedure under § 9891, Rev. Codes 1905, which requires the information to be set aside by the court upon motion, among other grounds, when the defendant is entitled to a preliminary examination before a magistrate before the filing of such information, when he has not had such examination, and been held to answer before the district court, or has not waived such examination in writing, or orally, before a magistrate.

A demurrer was also interposed to the information and various other motions submitted, but as the decision of the motion to set aside the information disposes of the appeal, it is unnecessary to pass upon the other errors assigned.

The state insists that the accused was not prejudiced by the action of the trial court in denying its motion to set aside the information, for the reason, as it contends, that the court could protect the appellant by excluding evidence, if offered, of the commission of the offense charged at any time subsequent to the preliminary examination; but it is obvious that this would furnish no adequate reason for a construction of the statute regarding setting aside informations which it could not be made to bear without doing violence to the language used, and we think he was prejudiced thereby.

Reversed, and the case remanded for further proceedings in accordance with law. All concur.

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## THE AMERICAN NATIONAL BANK, a Corporation, v. A. E. LUNDY.

(129 N. W. 99.)

### **Bills and Notes — Bona Fide Purchaser — Burden of Proof — Knowledge of Suspicious Circumstances — Negotiable Instruments Law.**

1. Following *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867, it is

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**Note.**—That fraud in obtaining the execution of a note is no defense in favor of the maker against a bona fide holder is shown by a review of the authorities in a note in 36 L.R.A. 434, and the question of presumptions and burden of proof in an action on note by purchaser is treated in a note in 17 L.R.A. 326. The question

*held*, that in an action by a purchaser, in due course, of a negotiable promissory note, the burden is cast upon the plaintiff to show himself a purchaser in due course, etc., when the defendant pleads and establishes the fact that the note was obtained by the original payee through fraud or was negotiated in breach of faith, but that such burden is sustained by the indorsee plaintiff showing a purchase for value and before maturity; and, further, that good faith does not require the purchaser to make inquiry as to the purpose for which a note was given or as to the existence of possible defenses, and that bad faith is only imputed from knowledge or notice of fraud or defenses and that mere knowledge or notice of suspicious circumstances will not defeat a recovery. *Held*, further, that this rule has not been relaxed by the enactment of the negotiable instrument law.

**Bills and Notes—Bona Fide Purchaser—Actual Knowledge of Defects.**

2. To defeat recovery on a negotiable promissory note purchased before maturity, where the defense is fraud in the inception of the note or negotiation in breach of faith, it must be shown that the indorsee had actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith.

**Bills and Notes — “Constructive” and “Actual” Notice of Defects — “Notice” — Statutory Construction.**

3. Section 6702, Rev. Codes 1905, provides that constructive notice is notice imputed by the law to a person not having actual notice, and § 6703, R. C. 1905, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instruments law have no application to actions upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by § 6358, which defines notice in such case as actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith.

**Bills and Notes — Evidence.**

4. In an action brought by an indorsee before maturity to recover on a negotiable promissory note, evidence that persons other than the defendant had given notes for a similar consideration, which notes had been placed in the hands of the plaintiff bank merely for collection, which bank had been informed by the makers that they suspected fraud in the inception of the notes, who thereafter informed the bank that matters were satisfactory and paid the notes, is inadmissible.

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what circumstances are sufficient to put a purchaser of negotiable paper on inquiry is treated in a note in 29 L.R.A.(N.S.) 351. On the general subject who is bona fide holder of note, see notes in 9 Am. Dec. 272; 44 Am. Dec. 698; and 35 Am. Rep. 688.



**Bills and Notes — Bona Fide Purchasers — Bad Faith.**

5. Showing knowledge of a contract made by the parties to a negotiable note and as a part of the same transaction is insufficient to charge an indorsee of the note for value and before maturity with bad faith, without also showing his knowledge of a breach of such contract.

**Bills and Notes — Evidence — Fraud.**

6. Certain testimony held erroneously received in the absence of proof connecting appellant with knowledge of a general scheme on the part of the original payee of the note to defraud parties who gave them.

**Bills and Notes — Evidence.**

7. Minor questions on admissibility of evidence passed upon.

Opinion filed December 23, 1910.

Appeal from the District Court of Barnes county; *Burke, J.*

Action upon a promissory note. Defendant had judgment.

Reversed and new trial granted.

*Lee Combs*, for appellant.

Mere knowledge of suspicious circumstances will not defeat a recovery. *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867.

Being an officer of a purchasing bank and the corporation that is payee of the note is not notice, if he is ignorant of the defenses. *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12.

Not mere suspicion, but bad faith and want of honesty, must be shown. *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; 7 Cyc. Law & Proc. pp. 945, 946; *First Nat. Bank v. Moore*, 78 C. C. A. 581, 148 Fed. 953; *Joyce Com. Paper*, § 475; *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024; *Massachusetts Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959; *Robbins v. Swinburne Printing Co.* 91 Minn. 491, 98 N. W. 331, 867; *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081; *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; 7 Cyc. Law & Proc. p. 948 and cases there cited.

Knowledge that a note was not to be paid on a certain contingency already taken place, if buyer was ignorant of it, will not defeat recovery. *Miller v. Ottaway*, 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; *Adams v. Smith*, 35 Me. 324; *Kelso v. Frye*, 4 Bibb, 493; *Dow v. Tuttle*, 4 Mass. 414, 3 Am. Dec. 226; *Davis v.*

McCready, 17 N. Y. 230, 72 Am. Dec. 461; Tiedeman, Com. Paper, § 42, and cases cited.

*Page & Englert*, for respondent.

Whether plaintiff purchased in good faith was for the jury. *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081; *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057; *Mee v. Carlson*, 22 S. D. 365, 29 L.R.A.(N.S.) 351, 117 N. W. 1033; *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522; *Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340; *Montrose Sav. Bank v. Claussen*, 137 Iowa, 73, 114 N. W. 547; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 A. & E. Ann. Cas. 665; *Neyens v. Worthington*, 150 Mich. 580, 18 L.R.A.(N.S.) 142, 114 N. W. 404; *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Mutual Loan Asso. v. Lesser*, 76 App. Div. 614, 78 N. Y. Supp. 629; *McGammon v. Shantz*, 49 App. Div. 460, 63 N. Y. Supp. 611; *Padget v. O'Connor*, 71 Neb. 314, 98 N. W. 870; *Harrington v. Butte & B. Min. Co.* 27 Mont. 1, 69 Pac. 102; *Taft v. Myerscough*, 197 Ill. 600, 64 N. E. 711; *Kipp v. Smith*, 137 Wis. 234, 118 N. W. 848.

Where there is fraud or lack of consideration, proof of these may be given, and burden is then on plaintiff to show that he is a holder in due course and for value. *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 A. & E. Ann. Cas. 665; *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522; *Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340; *Padget v. O'Connor*, 71 Neb. 314, 98 N. W. 870; *Neyens v. Worthington*, 150 Mich. 580, 18 L.R.A.(N.S.) 142, 114 N. W. 404; *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019; *State Nat. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551; *Bowman v. Metzger*, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090.

Knowledge of bad faith may be shown by evidence, direct or circumstantial. *Bowman v. Metzger*, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090; *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.

SPALDING, J. This is an action brought to recover on two negotiable promissory notes executed and delivered by the respondent to the Great Western Beet Sugar Company, and purchased by and indorsed to the appellant for value four days after their execution and delivery to the Sugar Company. They bear date the 14th day of May, 1906. One is for \$748, payable the 14th day of May, 1907, while the other is for \$630 and payable the 1st day of October, 1907, and they bear interest at the rate of 6 per cent per annum from their date. The answer, in short, alleges that they were executed and delivered by the respondent to the Great Western Beet Sugar Company, a corporation, as the purchase price for certain land and a water right in the state of Idaho which the payee claimed to own or control and be able to convey, and that at the time the notes were executed and delivered, contracts were also executed by the Sugar Company and delivered to the respondent, agreeing to convey such land and water right, and that another independent contract was at the same time executed and delivered, to the effect that if the respondent should visit Idaho at any time within one year, and should then become dissatisfied with his purchase, the Sugar Company would return all payments made and the notes to him. The answer also alleges that the appellant had full notice and knowledge of such agreements, and of all other facts set forth in the answer, prior to the time it became the holder of the notes in suit, and that for a long time prior thereto the cashier of the appellant bank had been a stockholder and member of said sugar company, and acquainted with the condition of said company, and its method of doing business, at the time of purchasing said notes and for a long time prior thereto; and further that the sugar company owned neither land nor water rights so agreed to be conveyed, and was unable to convey them; that respondent ascertained these facts on a visit to Idaho within the time required, and duly demanded of the company the return of the notes in question and the money paid.

The trial resulted in a verdict and judgment in favor of defendant, whereupon plaintiff submitted a motion for judgment notwithstanding the verdict, or for a new trial. The motion was denied and plaintiff appeals. We have heretofore filed an opinion in this case, reversing the judgment of the lower court and granting a new trial. Petitions for a rehearing have been submitted by both parties, and,

on a further examination of authorities and more extended consideration of this controversy, we think, while adhering to our original conclusions, that a new trial should be granted that incidental conclusions stated in our former opinion should be modified or changed. Many errors are assigned regarding the admission of evidence introduced for the purpose of showing fraud in the inception of the contract and in the negotiation of the notes, which it will not be necessary to notice. Without taking up the evidence in the exact logical order, it may be said that it fully sustains the answer of the defendant that, as a part of the same transaction as the giving of the notes, the contracts set forth in the answer were executed and delivered, and that the respondent visited Idaho within the time limited and was dissatisfied with his trade, and elected to rescind the same in accordance with the terms of the contract. Much parol evidence was admitted over objection, as to conversations between the respondent and the agent of the sugar company regarding the representations made to induce the giving of the notes, and with employees and officers regarding the reasons for his dissatisfaction with his venture. Error is assigned as to practically all of these conversations, and we think that at least those preceding the execution of the contracts were improperly admitted in so far as they relate to stipulations and negotiations subsequently covered by and embodied in the written contracts. Of course, in so far as such conversations have any tendency to disclose a fraudulent enterprise on the part of the sugar company or any of its officers to defraud defendant, or in so far as such conversations disclose fraudulent representations on the part of any representative of such sugar company made to induce, and which operated to induce, defendant to enter into such contracts, such testimony was clearly admissible. The contracts were plain and unambiguous, and, as far as they cover any of the oral negotiations relative to the terms of the contract, explain themselves. As to those on his visit to Idaho, some of them are incompetent; but so much as relates to the inability of the sugar company to locate or convey land or water right, or to respondent's notice of rescission and demand for his money, is competent. One of these contracts brings the notes in question within the terms of § 6357, Rev. Codes 1905, which reads: "The title of a person who negotiates an instrument is defective within the mean-

ing of this chapter when he obtained the instrument or any signature thereto by fraud, duress, or force, or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud." The sugar company negotiated these notes in breach of faith. This court held in *First Nat. Bank v. Flath*, 10 N. D. 281, 86 N. W. 867, on facts which we think make that case exactly in point, that where in an action on a negotiable note by an indorsee, the burden to prove a good-faith purchase has shifted to the plaintiff by the introduction of evidence showing fraud between the original parties thereto, the burden is sustained prima facie by showing a purchase for full value and before maturity. In the case at bar proof of the express agreement to return the notes in case of dissatisfaction shifted the burden to the plaintiff, and, in accordance with the holding in the *Flath Case*, that burden was sustained and a prima facie case made of holding in due course by the testimony of the cashier of the appellant, who was its executive officer and had sole charge of the purchase of this paper, as to having paid a valuable consideration therefor, and, that he bought it in good faith, and had no notice at that time, or any suspicion in his mind, that respondent had or would claim any defense to the notes. Had he made any inquiry of defendant before purchasing, he could not have learned of any breach of contract or defense, as it appears by the evidence that the respondent was not aware for more than eight months after the indorsement of the notes to appellant that he had been defrauded. In the same case it is held that good faith in the purchase of a negotiable note does not require the purchaser to make inquiries as to the purpose for which it was given or as to the existence of possible defenses, and that bad faith is imputed only from knowledge or notice of fraud or defenses, and that mere knowledge of suspicious circumstances will not defeat a recovery. The case cited was tried and decided before the enactment of the negotiable instruments law in this state, and if the law was correctly construed in the opinion from which we have quoted, the same principles apply with added force since the enactment of the negotiable instruments law, because we find that § 6358, Rev. Codes 1905, defines what constitutes notice of infirmity necessary to defeat recovery in a note obtained by fraud or negotiated in breach of faith. It

reads: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." The case at bar was tried on the theory that has been adopted in South Dakota and some other states generally, where the negotiable instruments law has not been enacted, that the provisions of § 6703, Rev. Codes 1905, are applicable in such cases. The first-named section provides that constructive notice is imputed by the law to a person not having actual notice, and the last named, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. Whether these sections would have any application in the absence of the negotiable instruments law, considering other provisions of our Code, may be questioned, but without such law, the construction of these sections by South Dakota courts is in harmony with only a minority of the courts of other states. The negotiable instruments law, and particularly § 6358, supersedes and renders inapplicable the old sections quoted above, if they were ever applicable, to the purchaser of negotiable instruments, and the suspicions or knowledge of facts sufficient to put a party on inquiry as to defects in title no longer necessarily constitute notice, or charge a party with notice of defenses on the purchase of commercial paper. He must have actual knowledge of the infirmity or defect, or knowledge of such facts as amount to bad faith. It may be here said that the evidence in this case does not establish the fact contended for, that the sugar company was unable to convey the land and water rights supposed to be covered by the contract. Indeed, it is open to question whether it agreed to convey any land by the terms of the contracts of conveyance, or whether the contracts, taken as a whole, amount to anything more than an agreement to convey a water right. Respondent cites *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, as an authority. We do not so consider it. In that case one of the principal reasons for holding that the plaintiff was not a good-faith purchaser was the fact that he failed to sustain his burden of proof by positive evidence, by failing to testify that

the purchase was in good faith, and only testified as to the negotiation of the note and that it was sold to him before maturity. He said nothing about the time of payment nor how paid, and his whole testimony was evasive and contradictory with reference to facts which must have been within his own knowledge, and he made no attempt to show that he did not have notice of defenses when he purchased the note. The other facts of that case made a very different question from the one presented in the case at bar.

The exhibits, being the contracts made with the respondent by the sugar company coincident with the execution of the notes in suit, were admissible in evidence to show the breach of faith affecting the title to the notes, and cast the burden upon the plaintiff. The next error to be noticed as assigned is the admission of Exhibit 1. In explanation of this exhibit, it may be said that, from the record, it appears that the principle defense relied upon by the respondent was that the cashier of the bank was a stockholder and officer in the corporation, the Great Western Beet Sugar Company. Exhibit 1 is a contract executed by that corporation on the one side and the cashier and numerous parties on the other, wherein each agreed to take \$2,000 worth of stock in such corporation, and to pay therefor, and the sugar company agreed to make five of the parties directors therein, and was to transfer to each of them a water right in the state of Idaho. The contract did not designate the parties who were to be so made directors. No testimony was submitted regarding this contract, except the testimony of Grady, the cashier, who testified that that contract had never been consummated further than that he got a water right under it. He testified that he had never been a stockholder or director. Appellant strenuously objected to the introduction of this contract in evidence. We are satisfied that at the time it was offered it was properly received.

It would have had a marked bearing on the question of knowledge had it been followed up with evidence showing that the contract had been performed, and that the cashier had become a director or officer actively engaged in the conduct of its affairs, although we think the authorities are to the effect that a bank is not charged with knowledge of defenses to promissory notes purchased by it from a corporation in which the bank officers are stockholders,

unless it is also shown that they had knowledge of defenses. See *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12, and authorities therein cited. In the absence of other evidence to show that the cashier was a stockholder or officer in the sugar company, having knowledge of its affairs and methods, we think a motion to strike out Exhibit 1, would have been sustainable had it been made. In the absence of such motion, we cannot say, under the circumstances, that reversible error occurred in admitting it in evidence, but it was of no evidentiary value. The next assignment we notice is the admission of the testimony of one Oglesby to the effect that Grady told him that he had a power of attorney authorizing him to execute a deed in the name of the sugar company to land in Idaho, and that he did execute and deliver such deed. The purpose of this testimony was to connect Grady with the action of the sugar company, and charge him with notice of knowledge of its fraudulent transaction with the respondent. We think no error was committed in the admission of this testimony. Grady squarely denied ever telling Oglesby that he had authority to execute such a deed, and that he ever executed and delivered such deed to him. If he did so tell him or did so execute such a deed, it would have some tendency to show that he was an agent of the company. The next assignment that need be noticed is the admission of evidence given by one Spangenberg, who testified that he bought some land of the sugar company and gave notes therefor, and that about November 1st, 1905, he received notice from the American National Bank that one of his notes would be due on the 15th of November, and that upon receiving such notice he went to the bank, and told Grady that he had been told by the secretary of the sugar company that he had been sold a piece of land to which the company had no title; that he was going to Idaho to investigate, and to let the matter rest until he returned; that Grady agreed to this and that he subsequently went to Idaho, saw the parties there, and fixed the matter up with the company, and on his return to Valley City paid the note. It was error to receive this evidence. It was a transaction with a third party, and had no tendency to show that Grady had any knowledge of anything further than that the company was dealing in lands or water rights, and, to sustain the defense, he must not only have known of the contracts with the re-



respondent when he purchased the notes in suit, but must also have been aware of the breach of contract on the part of the sugar company. This testimony had no tendency to prove the latter fact, and we think its receipt was prejudicial. *Jennings v. Todd*, 118 Mo. 298, 40 Am. St. Rep. 373, 24 S. W. 148. The witness Oglesby testified that he had given notes to the sugar company which were sent to the appellant, and that he had a talk with Grady during the month of January, 1906, about one of them, and told him that he had heard that it was for sale, that Grady asked him if it was all right, and that he replied that he supposed it was, but that he had a contract back of it, and that if the company complied with that contract, he would pay the note, while if it did not he should refuse to pay them, and that he refused to pay the amount to the bank until the company fulfilled the contract; that in a week or ten days after that conversation he told Grady he had been informed that one of his notes given the sugar company was offered to a third party at a liberal discount, and on being informed by Grady what the paper could be bought for, he purchased it. On cross-examination he testified that he went to Idaho just after Christmas, 1905, we assume to investigate the matter of the transaction between him and the sugar company, and that he never claimed that the note was owned by the bank or that he had any defense to the payment of the note, and did not tell Grady it was obtained by crooked work. This evidence was improperly admitted. It had no tendency to show knowledge on the part of Grady of any defense to the notes in suit, and was prejudicial to appellant.

Other errors are assigned as to the reception of evidence, most of which related to the question of the bank, prior to the purchase of the notes in suit, having notes for collection or sale from the sugar company. Grady's testimony on the subject being contradicted by other witnesses as to different points. We think none of this evidence was competent, in the absence of proof that connected the bank of Grady with knowledge of a scheme to defraud parties who gave notes, and being so, testimony intended to impeach Grady on these questions was incompetent. Evidence was admitted to show whether Grady made inquiry as to the financial responsibility of the respondent. This testimony undoubtedly was competent so far as it had any bear-

ing on that question, as if he did not know his financial condition and did not make inquiry, it would be a circumstance to be taken into consideration by the jury in connection with other facts, had any been shown, which might have a bearing on the good or bad faith of the appellant, but much of this evidence on this subject was wholly irrelevant, as, for instance, Grady testified that he made inquiry by telephone of a country bank, but that he did not get an answer from a certain officer of that bank. That officer was afterwards put on the stand, and he testified that he received no inquiry from Grady on the subject. Grady had not testified that he made the inquiry from that officer, and the officer testified that there were others in the bank who answer such inquiries. It would serve no useful purpose to specify the testimony of this nature which was material and which was immaterial.

Whether, after eliminating the evidence improperly received, there still remains sufficient evidence requiring its submission to the jury, on the question of the alleged connection of Grady with the sugar company and knowledge on his part of such company's fraud, we need not determine in view of another trial. The showing on these questions may be different on a new trial, and, of course, the question as to whether the case is one properly to be submitted to the jury will necessarily have to be determined in the light of such showing. Even if it be conceded that plaintiff was entitled to a directed verdict on such trial, it does not follow that it is entitled to judgment *non obstante veredicto* in this court. *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614, and cases there cited; *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024.

The questions presented in this case are of great interest, and would justify an extended consideration of the conflicting authorities with the diverse rules prevailing in the different states, but the work which is incumbent upon the court just at this time by reason of a change in its *personnel* to take place the first of January, and the necessity of disposing of all cases which have been argued before this change occurs, makes it impossible to classify and distinguish authorities, and it is unnecessary to do so, because the policy of this state has been fixed by previous decisions, and does not harmonize with the

authorities on which the respondent most strongly relies to sustain the action of the trial court.

The judgment is reversed and a new trial granted.

All concur, except MORGAN, Ch. J., not participating.

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## THE STATE OF NORTH DAKOTA v. W. H. GOTTLIEB.

(129 N. W. 460.)

### **Constitutional Law — Criminal Procedure in County Courts — Preliminary Examination.**

1. The constitution of North Dakota confers no right to a preliminary examination. It is accordingly held that § 35, chapter 80, Laws of 1909 of this state, which provides that "no preliminary examination shall be necessary before trial in criminal actions in the county court" is not unconstitutional.

### **Indictment and Information — County Courts — Verification on Information and Belief.**

2. The state's attorney instituted a criminal action in the county court by filing therein an affidavit in the form of a criminal complaint sworn to positively, wherein facts were stated showing the commission by appellant of the crime of maintaining a common nuisance in violation of the prohibition statute of this state, and by filing at the same time his information in due form and verified on information and belief in accordance with the statute. A motion was made to quash such information, which was overruled. *Held*, not error for reasons stated at length in the opinion.

### **Criminal Law — County Court — Information — Constitutional Law.**

3. The provisions of chapter 80, Laws of 1909, authorizing the institution of criminal proceedings in the county court by the filing of informations by the state's attorney, should be construed in connection with § 18 of the Constitution, which provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation."

### **Criminal Law — County Courts — Information and Indictment.**

4. At the time the state's attorney filed his information in the county court, he also filed a positive affidavit in the form of a criminal complaint, setting forth all the facts alleged in such information. *Held*, that this was a sufficient compliance with § 18 of the Constitution.

### **Criminal Law — Evidence — Certificate of Revenue Collector. —**

5. The prosecution offered in evidence a certified list of special taxpayers

furnished by the collector of internal revenue, which list includes defendant's name, and the same was received in evidence over defendant's objection. *Held*, prejudicial error for reasons stated in the opinion.

Opinion filed December 30, 1910.

Appeal from County Court, Wells county; *Alois Wartner, J.*

From a judgment of conviction for maintaining a common nuisance defendant appeals.

Reversed and a new trial ordered

*John O. Hanchett*, for appellant.

A criminal complaint sworn to on knowledge is essential to jurisdiction of a criminal action. *People v. Heffron*, 53 Mich. 527, 19 N. W. 170; *Bishop*, Crim. Proc. chaps. 716-719; *Com. ex rel. Parker v. Certain Lottery Tickets*, 5 Cush. 369; *Brown v. Kelley*, 20 Mich. 27; *People ex rel. Hackett v. Wayne Circuit Judge*, 36 Mich. 334; *Swart v. Kimball*, 43 Mich. 451, 5 N. W. 635; *Badger v. Reade*, 39 Mich. 774; *People ex rel. Van Valkenburgh v. Recorder of Albany*, 6 Hill, 429; *Proctor v. Prout*, 17 Mich. 473; *State ex rel. Poul v. McLain*, 13 N. D. 368, 102 N. W. 407; *State ex rel. Register v. McGahey*, 12 N. D. 544, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283.

Certificate of a public officer is evidence only when made so by law. *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687; *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

*John A. Layne*, State's Attorney, *Andrew Miller*, Attorney General, *C. L. Young*, Assistant, for respondent.

Provision that preliminary examinations in county courts are not necessary is constitutional. *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3; *State v. Brett*, 16 Mont. 360, 40 Pac. 873; *Hurtado v. California*, 110 U. S. 534, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675, 5 Am. Crim. Rep. 166; *Re Humason*, 46 Fed. 388; *State v. Kelm*, 79 Mo. 515; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

Giving bail waives irregularity in the complaint. *Re Cummings*,

11 Okla. 286, 66 Pac. 332; State v. Barr, 54 Kan. 230, 38 Pac. 289; State v. Longton, 35 Kan. 375, 11 Pac. 163.

State's attorney can file information when supported by affidavit. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Stevens, 19 N. D. 249, 123 N. W. 888.

Evidence of payment of a special United States revenue tax may be shown by copy of records in collector's office. State v. Gorham, 65 Me. 270; State v. Teahan, 50 Conn. 92; State v. Intoxicating Liquors, 44 Vt. 208; State v. O'Connell, 82 Me. 30, 19 Atl. 86.

FISK, J. Appellant was convicted in the county court of Wells county of the crime of maintaining a common nuisance, and he has appealed from the judgment of conviction. He assigns errors as follows:

1. The court erred in denying defendant's motion for a preliminary hearing.

2. The court erred in denying the defendant's motion to set aside and quash the information.

3. The court erred in overruling defendant's general objection to the introduction of any testimony under the information made at the opening of the trial.

4. The court erred in overruling defendant's objection to Exhibit 7.

5. The court erred in denying defendant's motion for a new trial made upon the ground of the errors occurring upon the trial above specified, and upon the ground that the jury was allowed to separate without leave of the court after returning to deliberate upon their verdict.

It was not error to deny appellant's motion for a preliminary examination. The statute governing the practice in county courts expressly provides that "no preliminary examination shall be necessary before trial in criminal actions in the county court." (Laws 1909, chap. 80, § 35.) That such statute is constitutional we entertain no doubt. The Constitution of this state confers no right to a preliminary examination. If such right exists, it is by virtue of some statute. Such was the express holding of this court in State v. Rozum, 8 N. D. 548, 80 N. W. 477. See also 1 Bishop, New. Crim. Proc.

§ 239a. Nor does a statute such as chapter 80, Laws 1909, contravene the "due-process-of-law" clause in our Constitution, or in the Federal Constitution.

*Hurtado v. California*, 110 U. S. 534, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3. The opinion in the latter case, to our minds, fully answers the very ingenious argument of appellant's counsel upon this branch of the case. Such argument would, no doubt, have much to commend it if addressed to the legislature, instead of to the courts. As argued by counsel the statute dispensing with preliminary examinations in the county court may, for reasons stated, be very harsh and drastic in many instances; but the remedy for this rests with the legislature, not the courts.

The second assignment challenges the ruling denying defendant's motion to quash the information. The grounds of such motion were:

"1. That defendant has never had or been allowed a preliminary hearing herein as provided by law, but has been refused the same.

"2. That the information herein does not purport to be sworn to by the state's attorney upon his own knowledge, but only upon information and belief, and is not accompanied by any deposition or testimony taken before him as state's attorney.

"3. That there never has been a criminal complaint made herein, as required by law.

"4. That this court is without jurisdiction in this action." For reasons hereafter stated we are unable to discover any error in such ruling. The first ground is untenable, as we have above noticed, for the reason that the defendant was not entitled to a preliminary examination under the statute. None of the other grounds enumerated in the motion are designated in the statute as grounds for quashing the information. Sec. 9891, Rev. Codes 1905, prescribes the cases in which an information may be set aside by the court in which the defendant is arraigned as follows:

1. In all cases when the defendant is entitled to a preliminary examination before a magistrate, before the filing of such information, when he has not had such examination and been held to answer before the district court, or has not waived such examination in writing, or orally before a magistrate.

2. When the information is not subscribed by a person authorized to act as informant.

3. When the information is not verified.

Appellant's counsel argues that the information being verified by the state's attorney on information and belief merely, and there being no proper showing of probable cause supported by oath or affirmation, that it was error to deny his motion to quash the information. Conceding that there was no showing of probable cause supported by oath or affirmation, does it follow that the court erred in refusing to quash the information? It was verified as required by law. Conceding that appellant was wrongfully arrested under a warrant issued without a previous showing of cause, supported by oath or affirmation, contrary to § 18 of our Constitution, does this furnish any ground for quashing the information? It was, no doubt, a good ground for setting aside the warrant under which he was thus illegally arrested, and, restoring him to his liberty, but further than this the authorities are not in entire harmony. The cases of *State v. Cropper*, 4 Kan. App. 245, 45 Pac. 131, and *State v. Blackman*, 32 Kan. 615, 5 Pac. 173, are authority upon the point that the information, being verified according to law, is sufficient for every purpose except merely for the purpose of issuing a warrant for the arrest of the defendant. We quote from the opinion in the latter case as follows: "The question in the present case is not whether a warrant was properly issued or not, or whether a warrant or an arrest thereunder is valid or not; but the sole question is simply whether the information, as verified by the county attorney, is sufficient. Now, it is our opinion that an information or complaint under the prohibitory liquor law of 1881, verified in accordance with § 12 of such law, is, so far as the verification is concerned, sufficient for every purpose except merely for the purpose of issuing a warrant for the arrest of the defendant. Such an information thus verified may properly be filed by the county attorney; a trial may properly be had thereon; a conviction may properly follow the trial; and the defendant may properly be sentenced upon such conviction. And an information thus verified is not subject to a motion to set it aside or to quash it merely because of the supposed insufficiency of the verification; nor may the cause be dismissed or the judgment arrested or a new trial granted for

any such reason, and the county attorney may not only rightly file the information under the prohibitory liquor law, and verify them in accordance with § 12 of such law, but it is his duty in many cases to do so, and it is always his duty to obey the provisions of that section. Of course, before a warrant is issued for the arrest of the defendant, an oath or affirmation within the meaning of § 15 of the Bill of Rights should be made, showing probable cause to believe the defendant guilty; but if no such oath or affirmation is made or filed, but nevertheless the defendant, without objection, pleads to the merits of the action, and goes to trial, he waives all irregularities in the verification of the information, and cannot afterward be heard to question the regularity or validity of any proceeding in the case, if he urges no other objection than that such verification is insufficient."

In *State v. Cropper*, *supra*, the information was verified upon information and belief, and filed with the information was the affidavit of one Phillips, verified before the county attorney. A motion to quash the information was made and denied. We quote from the opinion, as follows: "An information verified by the county attorney upon information and belief is a sufficient verification for every purpose, except merely for the purpose of issuing a warrant for the arrest of the defendant. *State v. Blackman*, 32 Kan. 615, 5 Pac. 173. No attack was made upon the warrant, either by motion to quash or to discharge from arrest."

On the other hand it has been held, or strongly intimated by equally good authority, that an information not supported by oath or affirmation so as to justify the issuance of a criminal warrant is insufficient for any purpose, and that a prosecution and conviction thereunder are violative of constitutional provisions similar to those in § 18 of our Constitution. Among the cases so holding are *Myers v. People*, 67 Ill. 503; *Lustig v. People*, 18 Colo. 217, 32 Pac. 275; *Thornberry v. State*, 3 Tex. App. 36. In *Myers v. People* the facts were quite analogous to those in the case at bar. The statute increasing the jurisdiction of county courts authorized the institution in that court of criminal proceedings by the filing of informations by the prosecuting attorney, the statute apparently making no provision for a preliminary showing of probable cause supported by oath or affirmation, but an affidavit was nevertheless filed prior to the filing



of the information. The judgment of conviction was affirmed, the court, however, made the following observation:

"There was an affidavit in this case which states, substantially, all that was required to be stated, though not so fully and formally as should be, and on which, if false, perjury could be assigned.

"We are of opinion that the 5th section of the county-court act should be construed with reference to the 6th section of the 'Bill of Rights,' which declares that 'no warrant shall issue without probable cause, supported by affidavit,' etc.

"If informations could be filed, upon which a warrant for arrest may issue without affidavit, the door would be opened to intolerable abuse; every man's liberty would be at the mercy of the caprice or malice of the state's or county attorney."

In *Lustig v. People*, supra, the prosecution was commenced in the county court by the filing of an information by the district attorney. Such information was not sworn to, neither was it based upon a preliminary examination previously held, nor upon the oath of any person. Defendant was arrested under a warrant issued on such information to quash the information because not verified or presented upon oath of any party was overruled, and defendant convicted. In reversing the judgment the supreme court of Colorado, after calling attention to the Bill of Rights in their Constitution, similar to § 18 of the Constitution of this state, among other things said: "The language of this section is too plain to admit of misconstruction. An information can serve no practical purpose in the administration of the criminal law, unless a legal warrant can be issued thereon. And to justify a warrant there must be a charge under oath, reduced to writing. The public prosecutor is no longer authorized to institute a criminal prosecution against any person by reason of his official signature merely. To allow him to do so would be contrary to the express provisions of the Bill of Rights quoted. And the 'probable cause supported by oath or affirmation,' prescribed by this section, is the oath or affirmation of those parties who depose to the facts upon which the prosecution is founded. *United States v. Tureaud*, 20 Fed. 621.

"This is now the settled law in the Federal courts, under the 4th Amendment to the Constitution of the United States, which is substantially the same as the provisions of our Bill of Rights: *United States v.*

Tureaud, *supra*; *United States v. Maxwell*, 3 Dill. 275, Fed. Cas. No. 15,750; *United States v. Polite*, 35 Fed. 58; *United States v. Smith*, 40 Fed. 755. . . .

"As the information in this case is not supported by the oath or affirmation of any person, the prosecution and conviction thereunder were in violation of the 7th section of our Bill of Rights. The motion to quash should have been sustained."

To the same effect is the case of *Thornberry v. State*, *supra*, except that the Texas statute for a showing of probable cause by oath or affirmation prior to presenting an information. The conviction was reversed for the reason that such showing had not been made. See also *Brown v. People*, 20 Colo. 161, 36 Pac. 1040, and *White v. People*, 8 Colo. App. 289, 45 Pac. 539.

In *State ex rel. Poul v. McLain*, 13 N. D. 368, 102 N. W. 407, this court held that a criminal complaint upon information and belief merely was not a sufficient showing of probable cause to authorize the issuance of a warrant of arrest, but it was further held that the provisions of § 18 of the Constitution, prohibiting the issuance of a warrant except upon probable cause supported by oath or affirmation, being designed for the protection of the person sought to be arrested, he has power to waive its protection, and that he did thus waive it in that case.

In disposing of this appeal we are not required to announce what our decision would be if no showing had been made of probable cause, as required by § 18 of our Constitution aforesaid. In the light of the record in this case we are not required to say whether defendant could raise this question by motion to quash the information, or as to whether, under the facts, he should be deemed to have waived the protection of the constitutional provision aforesaid.

The record discloses that a document labeled "Criminal Complaint," and alleging the facts set forth in the information, was sworn to positively by one Frank Borst, and filed in the office of the county judge, prior to the issuance of the warrant and on the same day the information was filed. This was a sufficient showing of probable cause to justify the issuance of the warrant, and while there appears to be no statute authorizing the filing of such a complaint, we are impressed with the soundness of the opinion in *Myers v. People*, 67 Ill. 503, to the effect that the provisions of chapter 80, Laws of 1909, in so far as they

purport to authorize the institution of criminal proceedings in the county court by the filing of an information, must be construed with reference to § 18 of the Constitution, which declares that "no warrant shall issue but upon probable cause supported by oath or affirmation."

For the above reasons we have reached the conclusion that the court below did not err in denying defendant's motion to quash the information.

What we have above said also disposes of appellant's third assignment.

His fourth assignment challenges the ruling of the county court in receiving Exhibit 7 in evidence. This exhibit consists of a certified list of special taxpayers in Wells county for the year ending June 30, 1910, furnished by one H. Ellerman, collector at Aberdeen, South Dakota, which list includes the defendant's name. Such list was filed by the county auditor in his office on November 12, 1909. After the same was identified by the auditor as one of the files in his office, the same was offered and received in evidence over defendant's objection. We think this was error. Conceding, as is argued by respondent's counsel, that § 8 of chapter 189, Laws of 1907, is still in force, notwithstanding the decision of the Supreme Court of the United States in *North Dakota ex rel. Flaherty v. Hanson*, 215 U. S. 515, 54 L. ed. 307, 30 Sup. Ct. Rep. 179 (which we need not determine), still there is no law making such list a public record in the auditor's office. Said section neither requires nor authorizes the filing of such list with the auditor. It was therefore, under well-settled rules of evidence, inadmissible as a public record. We think it was also inadmissible in the form presented, as an official certificate of the collector. It does not purport to be a certified copy of any official record in his office, but merely a certificate by him of the existence of certain facts as shown by his records.

For the error in the ruling admitting such exhibit, we are forced to reverse the judgment of conviction and order a new trial. Such error is presumed to be prejudicial, in the absence of a clear showing to the contrary, and in view of the fact the settled statement does not purport to embrace all of the evidence, we are unable to say that such error was nonprejudicial.

This conclusion renders it unnecessary to notice appellant's last assignment of error, which involves merely an irregularity on account of

the separation of the jury after the case had been submitted to it, and before such jury had rendered its verdict. Such irregularity will probably not arise on another trial.

Judgment reversed and a new trial ordered. All concur.

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## THE STATE OF NORTH DAKOTA v. JOE PELTIER.

(129 N. W. 451.)

### **Criminal Law — Supreme Court — Instructions.**

1. In a criminal case before the supreme court only on errors assigned as to certain portions of the charge to the jury, and in which none of the evidence is brought into the record, the instructions complained of will only be considered to determine whether they are abstractly erroneous, or wrong under any view of the case.

### **Criminal Law — Instructions — Presumption of Correctness.**

2. Instructions in such case are presumed to be correct if the record leaves any room for presumption.

### **Criminal Law — Trial — Instructions — Respective Functions of Court and Jury.**

3. The legislature having limited the functions of the court in a criminal trial by providing in § 9985, Rev. Codes 1905, that the court must only instruct as to the law of the case and by § 10026, Rev. Codes 1905, made the jury the exclusive judges of all questions of fact in such actions, the judge must not invade the province of the jury by expressing his opinion on the facts, or by weighing the evidence, or by giving intimations as to the guilt of the accused.

### **Criminal Law — Homicide — Fixing Penalty by Jury — Instructions — Duty of Court.**

4. By the provisions of § 8804, Rev. Codes 1905, the jury on finding the accused guilty of murder in the first degree, must designate in their verdict whether he shall be punished by death or by imprisonment for life. *Held*, that the only duty of the court with reference to the punishment in charging the jury is to inform the jury of the two methods of punishment, and that it is left to that body to determine which shall be inflicted.

### **Criminal Law — Homicide — Fixing Penalty by Jury — Instructions — Duty of Court.**

5. An instruction in a criminal case which advises the jury of reasons for inflicting the death penalty is erroneous as an invasion of the rights of the ac-

cused to have the question of his life or death passed upon solely by the jury, and this is emphatically so when no reasons are given for imprisonment.

**Criminal Law — Instructions — Invading Province of Jury.**

6. The jury is the sole judge as to what considerations should be allowed weight in deciding between the penalty of death and that of life imprisonment, and it is reversible error for the court to attempt to control the discretion vested in the jury on this subject. *Held*, that the charge on the subject of the death penalty, set forth at length in the opinion, infringed on the right of the defendant to have the jury unadvised and uninfluenced by the court, pass upon the question of his life or death.

Opinion filed December 31, 1910.

Appeal from a judgment of the District Court of Bottineau county; Goss, J.

Joe Peltier was convicted of murder and he appeals.

Reversed, and new trial granted.

*T. R. Mockler*, for appellant.

It was error to take from the jury the question whether prisoner was guilty of manslaughter. *Brickwood & S. Instructions to Juries*, § 4620; *Lynn v. People*, 170 Ill. 527, 48 N. E. 964; *Panton v. People*, 114 Ill. 505, 2 N. E. 411, 5 Am. Crim. Rep. 425.

Court cannot assume that a murder has been committed. N. D. Code, § 9985; *State v. Barry*, 11 N. D. 428, 92 N. W. 809; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Dorland*, 103 Iowa, 168, 72 N. W. 492; *Russ v. The War Eagle*, 9 Iowa, 374; *Roach v. Parcell*, 61 Iowa, 98, 15 N. W. 866; *State v. Hartzell*, 58 Iowa, 520, 12 N. W. 557.

*Andrew Miller*, Attorney General, *Alfred Zuger*, and *C. L. Young*, Assistants, for respondent.

Failure to instruct as to lesser grades is not error, where there is no proof of such minor offenses. *State v. Talbott*, 73 Mo. 347; 1 *Blashfield*, *Instructions to Juries*, § 190.

Cautionary instructions against effect of sex, sympathy, age, public opinion, race prejudice, are proper.

*Bingham v. Bernard*, 36 Minn. 114, 30 N. W. 404; *McTyier v. State*, 91 Ga. 254, 18 S. E. 140; *Lunsford v. Walker*, 93 Ala. 36, 8 So. 386; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *Brantley v. State*, 87 Ga. 149, 13 S. E. 257; *Smith v. State*, 4 Neb. 277; 11 *Enc. Pl. & Pr.* p. 371; *State v. Talbott*, 73 Mo. 347.

SPALDING, J. On July 22d, 1908, the defendant, Joe Peltier, was, by a jury, found guilty of the crime of murder in the first degree, and his punishment fixed by the verdict, as death. The information charged that the offense was committed in Bottineau county on the 21st day of June, 1908, by killing one F. W. Seidel.

A word of explanation of the delay in the presentation of this case is pertinent. The appellant was represented in the district court by counsel, who was shortly after the trial elected state's attorney of Bottineau county, and upon such election withdrew from the case. Difficulty was experienced by reason of the lack of means of the appellant in securing other counsel, but after he was incarcerated in the penitentiary, persons interested in his case secured the services of another attorney, who served a notice of appeal on the 28th day of June, 1909, but, before accomplishing anything in the way of perfecting the appeal, this attorney left the state permanently. Other counsel was then secured, who attempted to procure the settlement of a statement of the case, but failed, and as a result the appeal is before us on nothing but the judgment roll.

The judgment roll in this case was not transmitted to the clerk of this court until October 4, 1909, and it then contained no copy of the charge to the jury. The clerk of this court was informed by the clerk of the district court of Bottineau county, that he could not certify to the charge to the jury, as it was not in his office, and that after calling up all the attorneys of record in the case and the judge and reporter, he was unable to locate it. On the 31st day of October, 1910, it was still unlocated, and the clerk of that court wrote the clerk of this court that he held the receipt of the judge who presided at the trial, for the original charge, dated July 31, 1908, and that the judge said he would make another search and see if it could be found among his papers. December 2, 1910, a duly certified copy of the charge was received by the clerk of this court, which varies materially from what were supposed to be copies, but uncertified, used by the counsel for the respective parties in the preparation of their abstracts and briefs. It will thus be seen that this case has been presented in this court at the earliest possible date after the completion of the record. All the assignments of error before us relate to the charge to the jury.

When the evidence is not before the appellate court, it can only examine the instructions without regard to the evidence, and it will not re-

verse a case unless an instruction complained of is abstractly erroneous, or wrong under any view of the case. Instructions are presumed to be correct under the circumstances, and as applied to the evidence, if the record leaves any room for presumptions. *Campbell v. Peterman*, 56 Ind. 428; *South & North Ala. R. Co. v. Brown*, 53 Ala. 651; 1 *Blashfield*, Instructions to Juries, § 375; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037.

The legislature has seen fit to limit the functions of the court and those of the jury in criminal actions. They are distinct and separate. In charging the jury, the court must only instruct as to the law of the case (Rev. Codes 1905, § 9985), and the jury are the exclusive judges of all questions of fact (Rev. Codes 1905, § 10026), and the judge, in instructing the jury, must not invade the province of that arm of the court by expressing an opinion upon the facts, or giving intimations as to the guilt of the defendant, neither must he directly or indirectly weigh the evidence or any part of it. This interpretation of the sections cited was announced in *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003, and it was adhered to in *State v. Barry*, 11 N. D. 428, 92 N. W. 809, in a most carefully prepared and elaborate opinion, wherein numerous authorities were cited, and the distinction between the law on this subject in this state and the common law, and that of certain other states, was shown. Further discussion of this question is unnecessary in this opinion.

Error is assigned as to several paragraphs in the charge, as violating these provisions of the Code. While the language of these paragraphs is somewhat obscure and involved, and we have collectively and individually spent much time in considering them in attempting to determine their meaning, and while we are satisfied that they approach dangerously near the line of infringement, yet we do not feel justified in holding that they cross it and constitute reversible error. We do not set them out, for lack of time to fully discuss them, and because it would serve no useful purpose to do so, and we do not wish to lend our sanction to them and thereby invite their use by other courts in other trials. We pass them with these observations.

The defendant was convicted of murder in the first degree, and the penalty imposed by the verdict and judgment of the court was death. The legislative assembly has, by way of compromise with the opponents

of the death penalty, or for other reasons, provided by § 8804, Rev. Codes 1905, that "the jury before whom any person prosecuted for murder is tried shall, if they find such person guilty thereof, fix and determine by their verdict the punishment to be inflicted within limits prescribed by law, as, for example: If they find such person guilty of murder in the first degree they must designate, in their verdict, whether he shall be punished by death or imprisonment in the penitentiary for life; or if they find such person guilty of murder in the second degree, they must designate in their verdict the term of his imprisonment in the penitentiary, not less than ten and not exceeding thirty years." By this provision it was left to the jury in case of conviction of murder in the first degree, to fix the penalty, and it was left to the jury to do this by the exercise of its own discretion. The legislature has not required any reasons to be given for the penalty imposed, and does not empower the trial judge to indicate in any manner to the jury the penalty which it should fix, other than that the court shall inform the jury of the two methods of punishment, and that it is left to it to determine which shall be inflicted. When the court advises the jury as to grounds or reasons for inflicting the death penalty, or life imprisonment, he invades the province of the jury, and particularly so when he only instructs them as to the reasons for inflicting the extreme penalty; and such error is fatal.

A brief review of the authorities on this question is sufficient. In 1897 the Congress of the United States enacted a law providing that in all cases in which the accused is found guilty of the crime of murder under § 5339 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3627, the jury may qualify their verdict by adding thereto, "without capital punishment," and that whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life. (29 Stat. at L. 487, chap. 29, U. S. Comp. Stat. 1901, p. 3620.) It will be seen that this provision is identical in effect with § 8804, *supra*. Three persons were convicted of murder in the first degree, in the District of Columbia, and each was sentenced to death. Their cases went to the Supreme Court of the United States on error assigned as to the instructions of the trial court on this statute, and are reported as *Winston v. United States*, 172 U. S. 303, 43 L. ed. 456, 19 Sup. Ct. Rep. 212. The instructions complained of advised



the jury as to reasons which would be proper to move the jury to append the qualifications referred to, to its verdict. The instructions differed somewhat in each of the three cases, but the principle involved in each case was the same, namely, that of giving the jury reasons for imposing the death penalty or qualifying their verdict by the words, "without capital punishment." Mr. Justice Gray wrote the opinion, in which all three cases were reversed for this error. He uses this clear and emphatic language.

"The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the act of 1897.

"The act of Congress confers this right upon the jury in broad and unlimited terms, by enacting that 'in all cases in which the accused is found guilty of the crime of murder,' 'the jury may qualify their verdict by adding thereto, 'without capital punishment,' and that, 'whenever the jury shall return a verdict qualified as aforesaid,' the sentence shall be to imprisonment at hard labor for life.

"The right to qualify a verdict of guilty, by adding the words, 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the

act of Congress to the sound discretion of the jury, and of the jury alone.

"The decisions in the highest courts of the several states under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. *State v. Shields*, 11 La. Ann. 395; *State v. Melvin*, 11 La. Ann. 535; *Hill v. State*, 72 Ga. 131; *Cyrus v. State*, 102 Ga. 616, 29 S. E. 917; *Walton v. State*, 57 Miss. 533; *Spain v. State*, 59 Miss. 19; *People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090.

"The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words, 'without capital punishment,' unless mitigating or palliating circumstances were proved.

"This court is of the opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express words or by the apparent purpose of the statutes."

In *United States v. Williams*, 103 Fed. 938, Judge Boorman, in an opinion on a motion for a new trial, considered the same Federal statute, and held that the charge given, as it might have had the effect of limiting the power vested in the jury to determine absolutely the penalty to be imposed on conviction of murder in the first degree within the limits of the statute referred to, constituted reversible error.

In *People v. Bawden*, 90 Cal. 195, 27 Pac. 204, the court considered instructions which substantially told the jury that if they found defendant guilty of murder in the first degree, and also found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty of death by affixing the penalty at imprisonment for life, but that if the evidence did not show such extenuating circumstances then they should allow the death penalty to be imposed. This instruction was under § 190 of the Penal Code of California, which is in effect the same as § 8804, *supra*. That court held that in view of its prior decisions it would not hold such instruction reversible error, and declined to reopen the question, but remarked that they hoped trial courts would not make further excursions into this doubtful domain, and

if the question presented were a new one, there would be strong reasons for holding that, under § 190, the legislature intended to give the jury the entire power of fixing punishment in such case, uninfluenced by the court.

In *People v. Leary*, 105 Cal. 486, 39 Pac. 24, that court says: "Whatever may have been the actuating consideration in the minds of the legislature in enacting § 190, whether because they believed there are instances of murder falling within the definition of murder of the first degree, which, because characterized by a less degree of atrocity or other mitigating circumstances, call for a milder punishment than that of death, or whether their reason was something else, the fact remains that they have confided the power to affix the punishment within these two alternatives, to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect."

In *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1090, the court held that this discretion is given to the jury, and that the court cannot direct or advise them upon the subject, further than to inform them of their functions.

In *People v. Ross*, 134 Cal. 256, 66 Pac. 229, the court holds that the discretion which is given to the jury by § 190 of the Penal Code, in determining whether a person they find guilty of murder in the first degree shall suffer death or imprisonment in the state's prison for life, is a discretion to be exercised upon the jury's own consideration of the evidence, and without any instruction from the court as to the grounds or reasons for the mode in which they shall exercise it, and remarks, that "it has never been held that it would be proper for the court to attempt to control the exercise of this discretion by presenting them reasons for exercising it in one mode rather than in another."

In Georgia a statute provides that the punishment for persons convicted of murder shall be death, but shall be confinement in the penitentiary for life if the jury trying the case shall so recommend. The trial court instructed a jury that, if it found the defendant guilty, it was entirely within its discretion whether it would recommend that he be imprisoned for life, and said: "You are not limited or circumscribed. . . . If you think this is a case in which you would be justified in recommending life imprisonment in the event of your finding the defendant guilty, you have a right to make such recommendation as it is for you

to say, in the event of your finding the defendant guilty, whether the facts and circumstances in this case warrant you in making such recommendation. It is all a question for you under the law and the evidence."

The supreme court held that as an open question some of the language above quoted would be subject to serious criticism, and that it would be decidedly better to omit the use of the word "justified," and of the word "warrant," and to substitute language leaving the jury free to dispose of the question of recommending or not recommending life imprisonment, without any intimation from the bench as to what should control or influence them in reaching a conclusion upon such matter. *Cyrus v. State*, 102 Ga. 616, 29 S. E. 917.

In *Hill v. State*, 72 Ga. 131, it was held that a charge that the jury, in considering the question of recommending to mercy, should not be governed by their sympathies, but by their judgment approved by the evidence in the case and the law applicable to it, was error. This was on the same statute referred to in *Cyrus v. State*, supra.

We think these authorities are ample to sustain the principle which we have announced. We will now consider whether the portion of the charge referred to in the eighth assignment of error is in conflict with this principle. The charge of the court embraced over thirty typewritten pages, and, after apparently completing it, certain additions were made, and the last paragraph of the charge is the one referred to in the eighth assignment. It is the one by reason of its location with reference to the whole charge that must have been most emphatically impressed upon the minds of the jurors. It reads:

"So that in this case, gentlemen of the jury, should you find the defendants guilty of crime, it is for you to exercise your sound judgment in fixing the punishment to be imposed by the court, as the court is bound by your verdict as to the punishment it must impose, if you find the defendants or either of them guilty. In any event, do your duty fearlessly and conscientiously. Should you find the defendants, or either of them, guilty of the crime of murder in the first degree, you will, in fixing the punishment, bear in mind the reason for the prescribed punishment. You should, in such case, consider all the circumstances in the case and as disclosed by the evidence, and if you determine that there is an entire absence of extenuating circumstances in the commis-

sion of said crime of murder in the first degree, and in the manner of the commission thereof, and that said crime is atrocious and cold-blooded, and the interests of society, government, and law and order demand the extreme penalty, you should not shrink from imposing it. Do your duty as you may see it, having careful regard to your oaths as jurors and your conscientious convictions under the evidence, and the court's instructions, and do as your cool dispassionate judgment directs that it should be done, and in so doing you will do your duty as jurors in this case and as American citizens as well."

After giving these instructions long and careful consideration, this court is unanimous in the opinion that it in effect instructs the jury as to the grounds for inflicting the extreme or death penalty, and strongly intimates to the jury the opinion of the court that that penalty should be inflicted and that they should so find in their verdict.

It also comes within the prescribed rule of some of the authorities which we have cited, in presenting to the jury reasons for exercising its discretion in one mode rather than in another. *People v. Ross, supra*. It clearly advised the jury as to reasons for inflicting the penalty of death.

It comes very near informing the jury that the evidence showed that atrocious and cold-blooded murder had been committed. The opinion of the court as to the penalty to be prescribed by the jury may be somewhat concealed by the form of the expressions employed, but we think it was none the less apparent to the jury that the court expected them to return a verdict imposing the death penalty, and that by the language used, as well as the form of this paragraph of the charge, the right of the defendant to have the jury exercise its untrammelled, uninstructed, and uninfluenced discretion as to the penalty, was invaded.

In this state the trial courts do not possess the arbitrary power that is in some measure conferred upon and exercised by the Federal courts, much less are they given the wide range of influence on the trial of a case that obtains in the trial courts of England. In those courts the functions of the court and of the jury are not so clearly defined or so carefully separated as here, and we are aware that such courts frequently comment on the weight of the evidence, and express opinions as to the credibility of witnesses, and in other methods may influence the jury, but these methods have been discarded, in this state at least, and

the right of trial by jury, uninfluenced by the dignified persuasion of the bench, is carefully protected as to all questions of fact, or subjects like the penalty for murder, which are left to the discretion of the jury.

This court is not oblivious to the fact that an expensive trial would doubtless be obviated by an affirmance of this judgment, neither is it oblivious to the rights of society to protection, but we should be derelict in our duty if we overlooked one of the supreme rights of an American to be convicted of crime only in a legal manner and by lawful methods, and to have the facts passed upon by a jury. Trial courts, of necessity, must be extremely cautious in preserving an impartial attitude in the trial of cases. The accused has the same right to have the jury pass unadvised upon the question of his life or death that he has on the facts going to his guilt or innocence.

All lawyers of experience know that jurors are constantly watching the judge for some intimation by words or gesture, or by look, as to his opinion on the merits of the case in which they are sitting. The error in the instruction set out in assignment 8 is fatal to this judgment.

We think it advisable to add that the instructions to the jury in this case, taken as a whole, aside from those referred to on assignment 8, while presenting nothing very tangible, must have impressed the jury that, in the opinion of the court, the defendant had committed the crime of murder in the first degree without any mitigating or extenuating circumstances.

The judgment entered in the court below is set aside, and a new trial awarded to the defendant. All concur.

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**T. P. WILLIAMS v. FAIRMOUNT SCHOOL DISTRICT** of Richland County, North Dakota, a school corporation, and F. A. Deans, K. Currie and H. O. Hubbard, as Directors of said Fairmount School District.

(129 N. W. 1027.)

**Certiorari — Appeal and Error — Estoppel.**

1. The respondents herein applied to this court for a writ of certiorari in this action. Counsel in opposition to such application made certain statements

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Note.—As to right to vacate judgment for fraud, see note in 14 Am. Dec. 636.

and admissions as to the nature and effect of an application theretofore made to the district court by respondents herein. Such statements and admissions were acceded to on the hearing by the applicants for such writ. The opinion of the court found in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, was predicated largely upon such statements and admissions. *Held*, that on an appeal from an order made in said action, counsel cannot be heard to question the correctness of the action of the court in relying upon the statements and admissions so made on the application for the writ of certiorari.

**Res Adjudicata — Dismissal of Appeal on Stipulation — Application for Different Relief.**

2. The dismissal, entered on stipulation of counsel, of an appeal from an order of the district court is not an adjudication precluding the appellant therein and the respondent herein from subsequently applying to the district court for an order granting other and different relief from that denied by the order formerly appealed from.

**Jurisdiction — Vacation of Judgment — Second Application — Discretion.**

3. Respondents herein made application to the district court for an order vacating a judgment entered in this case by that court. The district court at that time did not have jurisdiction of the action as it was in this court on appeal. Immediately on the return of the record to the district court from this court, the application to vacate the judgment was renewed. *Held*, that the determination of the first application did not stand in the way of a new application on the same ground made after jurisdiction had been revested in the district court and in any event that the consideration of a second application while that court had jurisdiction of the action did not, under the circumstances of this case, constitute an abuse of discretion.

**Judgment — Vacation — Time for Application — Fraud and Collusion.**

4. An application not based upon the provisions of § 6884, Rev. Codes 1905, which provides, among other things, that courts may within one year after notice thereof, relieve a party from a judgment, etc., taken against him through his mistake, inadvertence, surprise, or excusable neglect, but made upon the ground that the judgment complained of was entered upon a collusive and fraudulent stipulation of the parties, and was in law a fraud upon the voters and taxpayers of the school district against which it was taken, a judgment may be vacated after the expiration of a year, by reason of the inherent power possessed by courts of general jurisdiction to set aside collusive and fraudulent judgments.

**Judgment — Vacation — Laches.**

5. Under the facts disclosed or the record in this case, and referred to in the opinion, *held*, that the moving party was not guilty of laches in making the application for the order appealed from herein.

**Judgment — Vacation — Affidavit of Merits.**

6. An application to vacate a judgment obtained by collusion and fraud upon the voters and taxpayers of a school district made, by a party affected on proper showing, need not be accompanied by an affidavit of merits.

Opinion filed January 20, 1911.

'Appeal from an order of the district court of Richland county; *Allen, J.*

*Affirmed.*

*Chas. E. Wolfe and Purcell & Divet, for plaintiff-appellant.*

*Dan R. Jones for defendants-appellants.*

Order of dismissal affirms order or judgment appealed from, and is *res judicata*. *Enderlin State Bank v. Jennings*, 4 N. D. 228, 59 N. W. 1058; *Clopton v. Clopton*, 10 N. D. 569, 88 Am. St. Rep. 749, 88 N. W. 652; *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866.

Time to move for vacation of judgment is limited to one year. *Rev. Codes 1905, § 6884; Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826; *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381.

Affidavit of merits must accompany motion. *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80.

*W. S. Lauder, for respondents.*

One year limit to vacate a judgment only applies to grounds mentioned in statute. *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937; *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748, 19 N. E. 842; *Garr, S. & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867; 15 Enc. Pl. & Pr. p. 266.

Affidavit of merit not required when application is on the grounds of improvidence, impropriety, or fraud. *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218; *Toy v. Haskell*, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; *Willson v. Cleaveland*, 30 Cal. 192; *Messenger v. Marsh*, 6 Iowa, 491; *Pease v. Kootenia County*, 7 Idaho, 731, 65



Pac. 432; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Morris v. Kahn*, 31 Misc. 25, 62 N. Y. Supp. 1040; 23 Cyc. Law & Proc. p. 956.

On dismissal of appeal with no directions to the lower court, the latter can make any proper order, as if there were no appeal. *Dorn v. Crank*, 96 Cal. 381, 31 Pac. 528; *Perry v. Gunby*, 42 Ga. 41; *Lee v. Pindle*, 12 Gill & J. 288; *Ashley v. Brasil*, 1 Ark. 144; *Freas v. Engelbrecht*, 3 Colo. 377; *Monti v. Bishop*, 3 Colo. 605; *Helm v. Boone*, 6 J. J. Marsh. 351, 22 Am. Dec. 75.

SPALDING, J. This is an appeal from an order entered on the 17th day of May, 1909, by the district court of Richland county, vacating and setting aside a judgment of that court in favor of the appellant herein, entered on the 19th day of February, 1908, and reinstating the action in which such judgment was entered on the calendar for trial in the district court of said Richland county on its merits, which order also directed that Honorable W. S. Lauder, counsel for E. W. Schouweiler, W. H. Cox, and K. Currie, be allowed to take part in the trial of said cause on behalf of his said clients, and all other citizens, electors, and taxpayers of Fairmount School District who may wish to be represented on the trial of said action, at the expense of the individuals employing said Lauder. The proceedings leading up to this are somewhat complex, and include the application to this court for a writ of certiorari on the part of the parties above named, which application was denied and the court's reasons for such denial stated in the opinion in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866. It is unnecessary to review at length the facts, or to detail the proceedings. In that opinion we held as one of the reasons for denying the application for the writ of certiorari that the applicants still had the right to apply to the district court to vacate its judgment in favor of the appellant herein, and thereby become parties to the record. The action is between the plaintiff, a citizen and taxpayer of the Fairmount School District, and the members of the school board, and it is sought therein to enjoin the school board from issuing bonds voted at an election held on that question for the purpose of erecting a schoolhouse. The applicants or petitioners in the certiorari proceeding, the respondents on this appeal, were all electors and taxpayers of the Fairmount School District, in

Richland county, North Dakota, and their rights were affected by the judgment entered by the stipulation in the action referred to, enjoining the school officials from issuing the bonds, and building the schoolhouse after the question had been submitted and carried at an election. They sought to participate in the defense in that action, but were denied that right by the trial court, after a substitution of attorneys had been made for the district by order of court, the one first employed having declined to stipulate for judgment against the district. After the application for the writ of certiorari was denied by this court, the respondents herein, as taxpayers and citizens of such district, applied in accordance with the suggestions in the opinion referred to, to the district court for the relief granted by the order now being considered.

Before determining this appeal, we refer to certain criticisms by counsel for appellant contained in his brief, of a statement contained in the opinion cited, to the effect that that application was treated solely in the trial court as an application to intervene after judgment. It is said that this was *dictum*, unwarranted by the record, and that in fact it was an application to vacate the judgment, and because the respondents herein appealed from the order denying that application, the matter is *res judicata*. Counsel has overlooked what occurred on the argument of that application, and statements made in his brief for the purpose of defeating such application. Such statements made orally and in the brief were to the effect that the applicants, the respondents herein, had the legal right after judgment, and still have the right, to ask the judge of the trial court to vacate and set aside the judgment below, and to permit them to intervene and conduct their part of the action and enforce their legal rights in it, and that the judge of that court had never denied such right, because they had never applied for it. It was conceded by the opposing counsel that intervention could not be had after judgment. We accepted the statements of counsel for both parties, and this was among the reasons for denying the application for the writ of certiorari. We dismiss the criticisms with this explanation, and proceed without opinion on the assumption, concededly correct, that that application was treated and to be considered only as stated.

1. An appeal was taken from the denial of the application of the respondents herein to intervene after judgment. That appeal, after the determination of the certiorari proceedings, was dismissed on stipu-

lation of counsel. It is now contended by appellant that this affirmed the order appealed from, and forecloses the right of respondents to the order from which this appeal is taken, and that therefore the trial court was in error in granting the application to vacate the judgment. It is apparent from what we have said that the application for the order from which this appeal is taken is for different relief from that applied for on the former occasion, and which involved the appeal dismissed, and it is clear that whatever the effect of that dismissal may be upon the rights of the parties as to the order then appealed from, it has no effect upon the order from which this appeal is taken, made upon an application asking substantially different relief.

2. A short time prior to the making of the application which resulted in the order from which this appeal is prosecuted, and after the determination of the application for the writ of certiorari, these respondents made an application to vacate the judgment referred to on grounds substantially the same as those set forth in their later application for the order from which this appeal is taken. That application was heard and denied, the appellant appearing and objecting to the granting of it, on the ground that the court had no jurisdiction, the records and papers in the case being then in this court in the certiorari proceeding. It is clear that the district court had not acquired jurisdiction for the reasons stated. It is equally clear that having no jurisdiction to grant the application to vacate the judgment by reason of the case being in this court, the determination of that application did not stand in the way of a new application on the same grounds, made after that court had resumed jurisdiction of the case. Even if it had obtained jurisdiction on the former application, it was largely in the discretion of the trial court whether to consider a subsequent application or not, as has been held by this court, and under the circumstances we see no abuse of discretion. *Clopton v. Clopton*, 10 N. D. 569, 88 Am. St. Rep. 749, 88 N. W. 562; *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529.

3. Appellant insists that the application for the order appealed from could not be entertained, because made more than one year after the entry of the judgment in question. He rests his contention upon the provisions of § 6884, Rev. Codes 1905, providing *inter alia* that the court may at any time within one year after notice thereof, relieve a party

from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and authorities construing that provision. This section of the statute has no application to the case at bar. The application to vacate the judgment was not made nor granted upon any of the grounds stated in that section. We held in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, that although the stipulation for the entry of judgment made in such case by the school board might have been made with the best of intentions, it was a legal fraud on the voters and taxpayers, the patrons of the school and the court, and that the stipulation was collusive, illegal, and void. It follows that the judgment entered upon such stipulation was fraudulent in law. Courts possess the inherent power to vacate and set aside collusive and fraudulent judgments, notwithstanding more than one year has elapsed after their entry. 23 Cyc. Law & Proc. p. 907; *Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638; *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132, is an interesting case involving several questions analogous to some in the case at bar.

4. Appellant's next point is that the moving parties were guilty of laches, and therefore could not be heard on the application to vacate the judgment. This contention has no merit. The certiorari proceeding was decided October 8th, 1908, and the record had not reached the district court on the 5th day of February, 1909, the date of the application, and probably not on the 12th day of March, 1909, when the order denying the application to vacate the judgment for want of jurisdiction was entered. It appears that the respondent proceeded immediately upon the record being returned to the trial court, as the order now under consideration was noticed on the 12th day of April, 1909, and entered May 17th, 1909.

5. It is finally contended that the order appealed from should not have been granted, for the reason that the application upon which it was entered was not accompanied by an affidavit of merits. An application to vacate a judgment because obtained by collusion or fraud need not be accompanied by an affidavit of merits. 23 Cyc. Law & Proc. p. 956; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797. And in some jurisdictions it is held that applications to vacate judgments for

material irregularities, where the ground of objection is clearly well founded, need not be accompanied by an affidavit of merits. 15 Enc. Pl. & Pr. p. 278. It has been so held by this court. *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937.

We reach this conclusion without considering or passing upon the contention of the respondent that in any event he was relieved from serving such affidavit, because the record before the court contained all, and more than sufficient to constitute a proper affidavit of merits.

We find no error in the record, and the order appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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## STATE OF NORTH DAKOTA v. CHARLES TRACY.

(129 N. W. 1033.)

### **Criminal Law — Intoxicating Liquors — Evidence — Freight Receipts.**

1. Defendant's receipts for freight shipments are competent evidence as admissions against him.

### **Criminal Law — Caution to Jury — Evidence.**

2. Court's caution to the jury during the trial *held* sufficient, in the absence of a request by defendant for more definite instructions.

### **Criminal Law — Caution to Jury — Striking Out Evidence.**

3. Where, at the time testimony was stricken out, the court fully cautioned the jury to disregard the same, an omission to again instruct the jury to disregard such testimony is not error,—especially when no request is made for such an instruction.

### **Criminal Law — Intoxicating Liquors — Evidence.**

4. Testimony examined, and *held* sufficient to warrant conviction for the crime charged.

Opinion filed January 16, 1911.

Appeal from the District Court of McLean county; *Winchester, J.* Charles Tracy was convicted of keeping and maintaining a common nuisance, and appeals.

Affirmed.

*George P. Gibson and Jas. T. McCulloch, for appellant.*  
*J. E. Nelson, for respondent.*

Goss, J. The defendant appeals to this court from a judgment of conviction for keeping and maintaining a common nuisance between the 1st day of April, 1909, and the 10th day of June, 1909, inclusive, on lot 2, block 5 of the village of Wilton, in McLean county.

The errors assigned are upon certain rulings of the court in the admission of testimony, and the court's instructions.

The state offered the testimony of the railroad freight agent that he used original waybills from which to make duplicate expense bills, entered them upon the company's office records, and, on the delivery of freight, took the receipt of the defendant on such expense bill for the freight delivered thereunder, such expense bill amounting to consignee's receipt for the shipment. The shipments so receipted for by the defendant were thirteen in number, nearly all for goods designated "beer." The witness identifies the signature to the receipts as that of the defendant, and testifies to the delivery of such freight to the defendant between the dates charged in the information; the date of the last two deliveries being June 12th, one cask of beer, and June 17th, one barrel of beer, respectively. The objection offered was that this testimony was incompetent, irrelevant, immaterial, and not the best evidence. The testimony offered is a written admission by the defendant, and is admissible under the holding of this court in the case of *State v. Dahlquist*, 17 N. D. 40, 115 N. W. 81, and authorities cited therein. The signature of the defendant receipting for the different items constituted competent evidence against him as to such merchandise receipted for by him.

Another assignment of error is based upon the admission of testimony of the officer acting under search warrant, as to finding beer on the premises in question on such search, made June 19th, one day after the last date specified in the information as the time of the commission of the offense. The court during the course of the trial sustained defendant's objection to further testimony relating to this date, June 19th, and at that time cautioned the jury against considering all testimony received as to this date, using the following language:

"Gentlemen of the jury, let me say to you that you need not regard

any exhibits which have been introduced here, or any testimony which has been introduced here with reference to any violation, or with reference to anything taken from the defendant's premises after the 18th of June, 1909."

Defendant's counsel made no motion or request during the trial that the jury be more definitely cautioned, nor any request for instructions on this matter when the court instructed the jury at the close of the case. Defendant predicates error on the admission of this testimony and the failure of the court to properly instruct the jury therein in its charge. The jury should not have misunderstood the court's caution. It is an explicit and positive instruction to them. If it did not satisfy counsel at the time, the court's attention should have been called to the matter by a request or motion. The court had the right to assume that defendant was satisfied therewith, and the defendant cannot be heard to complain of the court's action; and as defendant failed to request such instruction in the charge to the jury, no error can be based on the court's failure to instruct upon it.

Defendant further contends that the testimony offered did not show that he kept and maintained a common nuisance, as alleged in the information. The evidence is ample and uncontradicted to the effect that a common nuisance existed at the place described in the information; the delivery of beer in quantities to the defendant; the residence of the defendant at the place designated as constituting a nuisance; the congregating of people often at this place, and that the building in question was defendant's building; and the sale by him of beer at the cellar door of this house. This testimony was sufficient upon which to base the instruction to the jury, given by the court, as to keeping and maintaining of the place as a common nuisance. The court, under proper instructions, left this matter of fact for the jury to determine.

This disposes of all the assignments of error urged for the court's consideration.

The judgment of the trial court is affirmed. All concur.

**PETER C. ERICKSON v. PETER P. RUSS and Mary L. Russ.**

(32 L.R.A.(N.S.) 1072, 123 N. W. 1025.)

**Mechanics' Lien — Remedies — Judgment in Separate Action.**

1. Recovery of a judgment against the debtor, in a suit at law, does not waive the right to a lien nor bar an equitable action to enforce the same.

**Mechanics' Lien — Exhausting Remedies at Law.**

2. In the absence of statutory requirement, the lienor is not required to exhaust his remedy at law before resorting to the security of his lien.

**Mechanics' Lien — Foreclosure — Statutory Provisions.**

3. The remedy for the enforcement of a mechanics' lien by foreclosure, as prescribed by § 6245, Revised Codes 1905, is not governed by § 7481, Revised Codes 1905, relating to foreclosure of real-estate mortgages.

Opinion filed January 25, 1911.

'Appeal from the District Court, Billings county, *Crawford, J.*

Action by Peter C. Erickson against Peter P. Russ and another to foreclose a mechanics' lien. From a judgment sustaining a demurrer of defendant, Peter P. Russ, plaintiff appeals.

Reversed, with directions to overrule demurrer.

*Joseph Denoyer*, for appellant.

*J. A. Miller*, for respondent.

BURKE, J. The facts in this case, as stated in the complaint and admitted by the demurrer, are as follows: On or about the 19th day of March, 1906, the defendant was the owner of lot 4, block 2, original township of Beach, Billings county, North Dakota, and upon that day made a contract with the plaintiff, whereunder the said plaintiff performed certain work and labor upon the said lot in the way of excavating for a cistern and cellar. That said work was of the agreed value of \$70, and was completed by April 1st, 1906. That upon the 28th day of April, 1906, the plaintiff took the necessary steps to secure a mechanics' lien upon the said premises. That said lien is still in force and unsatisfied, and is the property of the plaintiff. That on the 19th day of May, 1906, the plaintiff started a suit at law upon the said debt



against the defendant Peter P. Russ alone, and finally recovered a judgment, which is still owned by the plaintiff and unsatisfied.

That during the time the work was being done, the defendant Peter P. Russ transferred the said premises to the defendant Mary L. Russ.

March 10, 1909, the plaintiff commenced an action in equity to foreclose the said mechanics' lien, making both Peter P. Russ and Mary L. Russ defendants. The defendants filed separate demurrers to the complaint, alleging that it appeared from the face of the said complaint that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained, and the plaintiff has appealed from the said orders.

The defendant Peter P. Russ makes but one objection to the complaint, which he states in his brief as follows: "The plaintiff has not exhausted his remedy for the collection of this debt, and, until there is an allegation in his complaint that an execution has been issued and returned unsatisfied, he cannot maintain this action."

In this contention the defendant is clearly wrong. The purpose of the mechanics' lien statute is to give to a certain class of creditors security upon the product of their labor or material, to which they may resort, irrespective of the ordinary remedies at law. The lien does not destroy any contractual relation of indebtedness that may arise, and the debt which would exist if there were no mechanics' lien may be enforced, like any other debt, by an action at law in proper court.

Neither is the lien waived or merged upon the obtaining of a judgment at law upon the debt. Until the lienor has realized upon said judgment or parted with the ownership thereof, it does not act to destroy his lien. *Germania Bldg. & L. Asso. v. Wagner*, 61 Cal. 349; *Brennan v. Swasey*, 16 Cal. 141, 76 Am. Dec. 507; *McNeil v. Borland*, 23 Cal. 144; *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539; *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170; *Gibbs v. Tally*, 133 Cal. 373, 63 Pac. 168, 75 Pac. 970; *Delahay v. Clement*, 4 Ill. 201; *Wake v. Canadian P. Lumber Co.* 8 B. C. 358; *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267; *Olson v. O'Malia*, 75 Ill. App. 387; *Ehlers v. Elder*, 51 Miss. 495; *Gridley v. Rowland*, 1 E. D. Smith, 670; *Raven v. Smith*, 71 Hun, 197, 24 N. Y. Supp. 601, Id. 148 N. Y. 415, 43 N. E. 863; *Webb v. Van Zandt* (C. Pl. Gen. T.) 16 Abb. Pr. 190; *Power v. Onward Constr. Co.* (Sup. Ct. Spec. T.) 39 Misc. 707, 80 N. Y. Supp. 21 N. D.—14.

950; *Murray v. Rapley*, 30 Ark. 568; *Potvin v. Wickersham*, 15 Wash. 646, 47 Pac. 25; *Salt Lake Lithographing Co. v. Ibex Mine & Smelting Co.* 15 Utah, 440, 62 Am. St. Rep. 944, 49 Pac. 768; *Roberts v. Wilcoxson*, 36 Ark. 355; *Brock v. Bruce*, 5 Cal. 279, 280; *Hunt v. Darling*, 26 R. I. 480, 69 L.R.A. 497, 59 Atl. 398, 3 A. & E. Ann. Cas. 1098; *Marean v. Stanley*, 5 Colo. App. 335, 38 Pac. 395; *Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549, 54 N. W. 720; *Vandyne v. Vanness*, 5 N. J. Eq. 485; *Anderson v. Huff*, 49 N. J. Eq. 349, 23 Atl. 654; *Fisher v. Russ*, 71 Pa. 40; *Fox v. Seal*, 22 Wall. 424, 22 L. ed. 774; *Cordova v. Hood*, 17 Wall. 1, 21 L. ed. 587.

Neither is the lienor under any obligation to exhaust his remedy at law before resorting to the security of his lien.

Defendant, however, contends that the foreclosure of mechanics' liens must be governed by the provisions of our Code, relating to the foreclosure of real-estate mortgages, and inasmuch as § 7481, Revised Codes 1905, requires that an execution be returned unsatisfied in a similar case upon the foreclosure of a real-estate mortgage by action, a similar requirement is imposed upon one foreclosing a mechanics' lien.

In this the defendant is also wrong. Section 6245, Revised Codes 1905, prescribes the action to be taken in foreclosure of mechanics' liens, and reads: "Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action, and, when separate actions are commenced, the court may consolidate them. Whenever, in the sale of the property subject to the lien, there is a deficiency of the proceeds, judgment may be entered for the deficiency, in like manner and with like effect as in actions for the foreclosure of mortgages." We do not believe that the last sentence, providing for the entry of a deficiency judgment in like manner and with like effect as in actions for the foreclosure of mortgages, can be construed to mean that the whole procedure must be the same. See *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39.

Our attention has been called to the cases of *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645, and *Barbig v. Kick*, 70 N. Y. S. R. 470, 35 N. Y. Supp. 676. These cases were decided under statutes providing that a mechanics' lien shall be enforced in the same manner as

an action to foreclose a real-estate mortgage. As already pointed out, we have a very different statute, and those cases do not apply.

The demurrer should have been overruled and the District Court is directed to so order. All concur.

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PETER C. ERICKSON v. PETER P. RUSS, Defendant, and Mary L. Russ, Defendant and Respondent.

(129 N. W. 1029.)

**Mechanics' Lien — Foreclosure — Rights of Purchaser — Subject to Lien.**

A person who purchases premises upon which there is a valid mechanics' lien cannot compel the lienor to exhaust his legal remedies against the original debtor before resorting to the security of his lien.

Opinion filed January 25, 1911.

Appeal from District Court, Billings county; *Crawford, J.*

Action by Peter C. Erickson against Peter P. Russ and another to foreclose a mechanics' lien. From a judgment sustaining the demurrer of defendant Mary L. Russ to the complaint, plaintiff appeals.

Reversed with directions to overrule demurrer.

*Joseph Denoyer*, for appellant.

*Keohane & Gallagher*, for respondent Mary L. Russ.

BURKE, J. This is a companion case to *Erickson v. Russ*, ante, 208, decided to-day by this court. An examination of the opinion in said case will disclose the facts in this case and also dispose of most of the questions of law arising on this record.

The defendant Mary L. Russ, this respondent, however, makes the further point that, "before the property of a third party can be subject to the payment of the debt of another, the complaint must allege that an execution has been issued against the property of the principal debtor, and returned unsatisfied."

Even if this statement were true, it would not apply to the case at bar. The plaintiff herein is not seeking to enforce his debt against Mary L. Russ, nor to hold her as guarantor. He does not ask for a de-

ficiency judgment against her. He is in pursuit of property upon which he has a valid lien, and asks only that his lien be adjudged to be prior to the claim of respondent; that said property be sold to satisfy his said lien, and, if necessary, for a deficiency judgment against Peter P. Russ alone.

The demurrer should have been overruled, and the District Court will so order. All concur.

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**E. H. FULLER v. THE BOARD OF UNIVERSITY AND SCHOOL LANDS OF THE STATE OF NORTH DAKOTA, and Alex. McDonald, as Commissioner of University and School Lands of the State of North Dakota.**

(129 N. W. 1029.)

**School Lands — Sale — Power of Board of University and School Lands.**

1. Section 156 of the state Constitution, providing for the Board of University and School Lands, construed with statutory enactment carrying the same into effect, gives said board general and full powers in the sale of school lands, except as otherwise limited by constitutional and statutory enactment.

**School Lands — Sale — Power of Board of University and School Lands.**

2. Such grant of power carries with it the duty by the board of using judgment and discretion in such matters, commensurate with the importance of its duties as the trustee of the school fund of the state.

**Public Lands — Disapproval of Sale by Board — Right of Review.**

3. Under section 174 of the Revised Codes of 1905, providing for the approval and consummation of school sales by the board, the disapproval by the board of a sale of school lands, and refusal to cause contract of sale to be executed, of land struck off at a school sale to a bidder, cannot be reviewed or controlled by the courts, the board's conclusion being final.

**Mandamus — Review of Discretionary Acts of Board.**

4. Held, further, that such decision of the board is a quasi-judicial determination, as distinguished from ministerial acts; and mandamus will not lie to review the same, or the evidence or information upon which such decision was based.

**Certiorari — Grounds — Jurisdiction.**

5. Under the facts disclosed by the record in this case, certiorari will not lie to review such action of the board.

Opinion filed January 30, 1911.

Appeal from the District Court of Burleigh county; *Winchester, J.* Affirmed.

*Engerud, Holt, & Frame*, for appellant.

Ministerial and administrative duties, although involving exercise of judgment and discretion, may be coerced by mandamus. *Merrill, Mandamus*, § 44; 26 Cyc. Law & Proc. p. 161; *Haynes, New Trials*, § 323; *State ex rel. Keane v. Murphy*, 19 Nev. 89, 6 Pac. 840; *State ex rel. Humboldt County v. Lander County*, 22 Nev. 71, 35 Pac. 300; *Stockton & V. P. R. Co. v. Stockton*, 51 Cal. 328, 339; *People v. Alameda County*, 45 Cal. 395; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *Raisch v. Board of Education*, 81 Cal. 542, 22 Pac. 890; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *State ex rel. Adamson v. Lafayette County Ct.* 41 Mo. 226; *Glencoe v. People*, 78 Ill. 382.

Where a board or officer has to determine facts that impose a duty, the decision is not conclusive upon the court in mandamus, unless the statute expressly imposes the sole discretion on such officials. *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766, and cases cited.

If the duty to investigate for fraud or irregularity was judicial, it can be reviewed on mandamus for fraud. *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; 2 *Spelling, Inj. & Extr. Rem.* p. 1135, § 1384; *Merrill, Mandamus*, § 38; *Gunn v. Lauder*, 10 N. D. 389, 87 N. W. 999; 26 Cyc. Law & Proc. p. 161.

*Andrew Miller, Alfred Zuger, and C. L. Young*, for respondent.

Mandamus will not control or review the discretion of a court, board, or officer in judicial or quasi-judicial acts. 26 Cyc. Law & Proc. p. 160; *High, Extr. Legal Rem.* §§ 42 & 43; *United States ex rel. Tucker v. Seaman*, 17 How. 225, 15 L. ed. 226; *United States v. Commissioner (United States ex rel. McConnell v. Edmunds)* 5 Wall. 563, 18 L. ed. 693.

Approval involves the exercise of discretion and judgment. *Cosner v. Colusa County*, 58 Cal. 274; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 44, 57 Pac. 449; *Words & Phrases*, p. 475; *DePoyster v. Baker*, 89 Tex. 155, 34 S. W. 106; *Com. ex rel. Vandyke v. Henry*, 49 Pa. 533; *State ex rel. Marsh v. State Land Comrs.* 7 Wyo. 478, 53 Pac. 292.

Mandamus will only lie for nonaction, to compel a tribunal to come to a decision. *People ex rel. Harris v. Land Office Comrs.* 149 N. Y. 26, 43 N. E. 418, 26 Cyc. Law & Proc. p. 158; *Merrill, Mandamus*, § 42; *Ex parte Burtis*, 103 U. S. 238, 26 L. ed. 392; *State ex rel. Marsh v. State Land Comrs.* 7 Wyo. 478, 53 Pac. 292.

Mandamus will not lie to correct or review the decision of an inferior tribunal or officer. 26 Cyc. Law & Proc. pp. 160, 177; *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, 82 N. W. 158; *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 51 L.R.A. 33, 79 N. W. 108; 2 *Spelling, Inj. & Extr. Rem.* 2d ed. § 1393; *State ex rel. Marsh v. State Land Comrs.* 7 Wyo. 479, 53 Pac. 292; *People ex rel. Harris v. Land Office Comrs.* 149 N. Y. 26, 43 N. E. 418; *State v. Winchester*, 18 N. D. 534, 122 N. W. 1111; 6 Cyc. Law & Proc. pp. 750-752.

Goss, J. Plaintiff brings mandamus to compel execution and delivery of a contract for the sale of school lands which defendant commissioner struck off to plaintiff at a sale of school lands in Steele county, at which plaintiff was the highest and only bidder for certain lands. All preliminaries prior to sale were complied with, and, on the sale, payment was made by the purchaser to the county treasurer, pending approval of the sale by the Board of University and School Lands. After an investigation, and on information before it, said board disapproved the sale, finding fraud and collusion between the plaintiff and other bidders at the sale, and, on plaintiff's petition for review by the board, the sale was again disapproved for inadequacy of price paid for the land.

Thereafter mandamus proceedings were instituted in district court to compel the issuance and delivery of a contract of sale by the board and commissioner to the plaintiff for the land. After trial the court dismissed the proceeding, holding the decision of the board final and conclusive, and not subject to review by mandamus; from which decision plaintiff appeals, alleging specifications of error sufficient to bring all questions embodied in the record before this court for determination.

The decision of this action involves:

- (1) The powers and duties of the board under the facts in this case;

(2) Whether such duties are judicial, quasi-judicial, or merely ministerial;

(3) Whether the decision of the board is reviewable by mandamus or certiorari.

The Board of University and School Lands is provided for by the State Constitution, § 156 thereof providing, "Said board shall have control of the appraisement, sale, rental, and disposal of all school and university lands," subject, however, to further constitutional limitations as to manner of sale, minimum price, payments, and investment of income derived from the sale of these lands. Under such authority the legislature has, in Articles 1, 2 and 3, chapter 4, of the Political Code, more definitely defined the above powers and duties, their exercise and limitations; and providing for a State land commissioner as the ministerial agent of the Board of University and School Lands, specifically defining his duties; and providing further that, subject to the provisions of constitutional and statutory restrictions, "such board shall have the full control of the selecting, appraisement, rental, sale, disposal, and management of all school and public lands of the state," and "the investment of the permanent funds derived from the sale thereof or from any other source, and shall have power to appoint a competent person to act as the general agent of the board in the performance of all its duties pertaining to the selection, sale, leasing, or contracting in any manner allowed by law, and the general control and management of all matters relating to the care and disposition of the public lands of the state, all of whose official acts shall be subject to the approval and supervision of the board. The title of such agent shall be 'Commissioner of University and School Lands.'" Sec. 153, Code 1905. The duties of such Commissioner of University and School Lands are as defined in the foregoing, and § 166, Code 1905, as further supplemented by statutory provisions defining or limiting the exercise of such duties imposed, among which is § 174, Code 1905, reading in part: "The county auditor shall act as clerk of all land sales and leases, made in his county, and it shall be his duty, within five days after such sale or lease shall have been concluded, to certify to the Board of University and School Lands a list of lands sold or leased, as provided in this article, with the price thereof, and the name of the purchaser or lessee of such tract, the amount for which the lands are sold or leased, the amount of money paid by

said purchaser, and the amount of principal remaining unpaid, and the Board of University and School Lands shall approve and confirm the sale or lease of every such tract, as upon examination of such certified lists and such further information and investigation as shall be deemed necessary, shall be found to have been sold or leased in accordance with the law and without fraud or collusion." The statute further provides that "immediately upon the approval of the sales by the Board of University and School Lands the secretary of such board shall prepare and certify a list of said approved sales to the commissioner, who shall, without delay, execute duplicate contracts in the form prescribed by the board, and forward the same to the county auditor of the county where the land was sold" [§ 175], who, upon execution of said contracts by the purchaser at the sale, and his payment of moneys and fees required, shall deliver a duplicate contract to the purchaser. This consummates the sale between the state and the purchaser.

As to the powers of said board, it is significant that the Constitution (§ 156 above quoted) gives said board general powers in these words: "Said board shall have control of the appraisement, sale, rental, and disposal of all school and university lands." This has been construed and made even more definite by § 153, Code 1905, providing: "Such board shall have the full control of the selecting, appraisement, rental, sale, disposal and management of all school and public lands of the state," the legislature having, in its construction of the constitutional provision, used the words, "full control," "selecting," and "management," with the other terms used in the constitutional enactment. Then, again, the legislature, construing such constitutional authority, has given to the commissioner the "general charge and supervision of all lands belonging to the state;" and in this connection the office of commissioner was created to carry into effect the will of the board, and by statute (§ 153) designated "the general agent of the board in the performance of all its duties pertaining to the selection, sale, leasing, or contracting in any manner allowed by law, and the general control and management of all matters relating to the care and disposition of the public lands of the state," and to perform ministerial duties for the board.

The board, then, as construed by legislative enactment on the matter of its powers, has full control of the selecting, appraisement, rental, sale, disposal, and management of school lands of the state. It acts as a



body for and on behalf of the state. With this grant of general power is expressly and impliedly conferred the duty of using judgment and discretion in such matters, commensurate with the importance of the trust reposed in it. This is the plain intent of the Constitution and statute creating the board and defining its duties. It is, then, a board vested with discretion in the performance of its duties generally, except where it is by law specially limited therein. Sec. 174, Code 1905, provides this board, on the county auditor's return made of sales of school lands, "shall approve and confirm the sale or lease of every such tract as, upon examination of such certified lists and such further information and investigation as shall be deemed necessary, shall be found to have been sold or leased in accordance with the law and without fraud or collusion." Could any language be used to give this board more general authority to act according to its judgment and discretion? It is not limited to the county auditor's return, or to any particular investigation in kind, amount, or sufficiency. The board is specifically given the right to make such further investigation as it shall deem necessary, touching the sale. It may receive and act upon such proofs as it deems competent and as shall satisfy its reason and judgment in the matter. The board must determine to its own satisfaction that the sale was in accordance with law, and without fraud or collusion, before it can approve such sale. An investigation must be made to determine this, but the amount of investigation and the quality and sources of information are left for its determination. Every member of the board, like every public officer, is presumed to know the law, and enjoined to follow it, as the sale must be "in accordance with law." To do their duty they must remember the board is a trustee for the state in the matter on which it acts; that the Constitution vests it with power over the school lands, and thereby supervision over the school fund, which the Constitution, by express terms, says shall remain "inviolably appropriated and applied to the specific objects of the original grants,"—the schools of this state. Under every rule of public policy the proper execution of its trust demands that every sale of school land by this board shall be, as is aptly declared in *State ex rel. McKinnon v. Scott*, 17 Neb. 686, 24 N. W. 337, "for the highest price possible to be obtained, to increase and protect by all honorable means the funds for the support of the educational institutions."

A sale otherwise in accordance with law, but made through fraud or collusion, is void under the terms of the statute quoted, and is specifically declared so by § 176, Code 1905, reading: "Any sale made by mistake, or not in accordance with law, or obtained by fraud, shall be void, and the contract of purchase issued thereon shall be of no effect." Under the statute the board must pass judgment upon, among other questions, that of fraud or collusion in the sale. As this is a matter necessarily difficult to determine, and of which the proof, from the very nature of things, often cannot be made to a degree that court procedure usually requires, the question of the sufficiency of the proof, competency of evidence, and the manner of determining the same, is not limited, under the statute, by any specific rule other than that all these matters are left to the discretion and determination of the board, the statute giving it the full authority in this matter granted elsewhere in the statute in general terms, as heretofore set forth. It has full control of the disposal of public lands under the statute, and § 174 of the Code of 1905 does not in anywise abridge or limit such control or discretion on so important a matter as the very act of final determination as to whether to ratify the sale and thereby pass the matter from its control. In other words, it would be an unreasonable construction of the statute to say that the board has full authority as to the disposal of public lands, except as to the most important step in the proceedings,—that of determining compliance or noncompliance with the law, adequacy or inadequacy of price, fraud or collusion or absence thereof in the sale,—all of them matters regarding which it was the very spirit and object of the Constitution and the law that it should be passed upon by a board whose judgment should be as sound as it should be conclusive. Indeed, the personnel of the board but emphasizes the judgment and discretion presumed to be exercised in the alienating for price of state property, the Constitution providing for the united judgment thereon of a board composed of the governor, superintendent of public instruction, attorney general, secretary of state, and state auditor.

Upon an investigation of the above matters, this board approves or disapproves the sale, and on the approval depends the sale. If this board should have the full control given it by statute, certainly its approval should not be controlled by courts. It is the approval of the board, not of courts, upon which the question of alienation of state's

property depends. The very act of approval, unless limited by the context of the statute providing therefor, imports the act of passing judgment, the use of discretion, and a determination as a deduction therefrom. 1 Words & Phrases, p. 474; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 44-51, 57 Pac. 449; *Cosner v. Colusa County*, 58 Cal. 274.

If the Constitution intended the decision of the board to be final it cannot be disturbed by mandamus. *Wood v. Strother*, 76 Cal. 545-554, 9 Am. St. Rep. 249, 18 Pac. 766.

Viewed in the light of the reasons for these constitutional and statutory enactments,—the importance of the duties conferred upon the board so created, the necessity for the exercise of a high degree of judgment and discretion by a tribunal competent to do so, and charged with administering as a trustee of the millions in this greatest of all state funds, our school fund,—would it not be most absurd to do otherwise than to give full force to the mandate of the Constitution and statute granting full power to this board in the exercise of discretion and judgment in this the most important part of its duties, approval of sales of state property? We must conclude such duty is wholly discretionary, and its decision as a body is a quasi-judicial determination.

The board has acted, and by resolution disapproved the sale because of fraud and collusion between the buyers, and inadequacy of the price bid. Certain of the evidence upon which its conclusion is based is before the court, and consists of an affidavit, letters, information, and circumstances regarding sale and purchase price of this and other tracts. Possibly the board had further information, the extent of its investigation is not disclosed; it suffices that it had evidence and information, acting thereon in the exercise of discretion, disapproved the sale; presumably the board did its duty. This court will not weigh in this mandamus case the evidence that was before the board, but, instead, recognizes that this board was charged by law with a duty, that of approving or disapproving this contract of sale, and that it has performed its duty, inasmuch as it has acted in the matter.

Mandamus has never been regarded as the proper remedy to control the judgment and discretion of an officer in the decision of a matter as to which the law gives him power and imposes upon him the duty to decide for himself, where the duty is such as requires the examination

of evidence and the decision of questions of law and fact. High, Extr. Legal Rem. §§ 42-48; Merrill, Mandamus, § 46; Spelling, Legal Rem. § 1384; 19 Am. & Eng. Enc. Law, p. 732; 26 Cyc. Law & Proc. p. 158; 8 Enc. U. S. Supp. Ct. Rep. 31.

The above authorities cite cases from every jurisdiction, declaring and applying with little variance this now elementary principle.

Plaintiff claims the acts of the board in approving sales are but ministerial and administrative duties involving limited exercise of judgment and discretion in determining the existence of certain facts, after determining which the approval is a ministerial duty, and that an erroneous decision as to such preliminary questions of fact may be reviewed by mandamus. For reasons hereinbefore stated, this contention is contrary to our construction of the statute, and contrary to facts as to the real duties of the board.

That this case does not come within this rule has practically been adjudicated by our court in *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729, in which the same counsel urged the same construction in an action in mandamus against a county auditor, in a mandamus to compel issuance and delivery of a salary warrant to a county superintendent of schools, the only preliminary matters of fact for the auditor's determination being the number of schools in the county, the same being the basis for the salary paid the superintendent, and whether on such basis the superintendent was already paid by overpayments previously made, and whether it was the plain duty of the auditor to determine these questions as preliminary questions to a purely ministerial duty of issuing and delivering the salary warrant. Certainly the determination of these matters of general knowledge would be much more simple and easy and embody less discretion and judgment than approval of the sale of school lands from evidence on independent investigation touching fraud, collusion, adequacy of price, and regularity of sale proceedings, as in the case on trial. But in the case cited the writ was denied on the grounds that the act of passing on the county's liability to the county official by the auditor under those circumstances, in the issuance of the salary warrant, was not a purely ministerial duty, and that "the auditor had a discretion to exercise as to his official actions, and mandamus will not lie to cause him to act when he is vested with such discretion." See also *State ex rel. Marsh v. State Land Comrs.* 7

Wyo. 478, 53 Pac. 292, wherein, at page 490, the court states: "The exercise of the power conferred upon the board to lease the lands of the state in the manner and to parties which shall inure to the greatest benefit and secure the largest revenue to the state requires judgment and discretion. No inflexible rule is laid down for the guidance of the board in those matters. The judgment and discretion to be exercised is judicial in character, and in an application for the writ of mandamus it is not proper for the court to interpose its opinion and judgment in the place of that of the board, even if the conclusion which the latter has reached upon the facts should appear to have been erroneous."

Counsel for plaintiff argues that the writ must lie to review the discretion of the board, and that the discretion and decision of the board is not conclusive, otherwise the board could, by fraud and collusion, preclude the state as against a purchaser of school lands. In other words, the rule against the review of the discretion of the board by mandamus should apply to the state as well as the purchaser, and, if so, the state, being unable to review the acts of the board by mandamus, might be injured by the fraud or collusion of the board. While the state cannot try the matter of fraud by mandamus to review the discretion of the board, any more than can the plaintiff in this action disprove fraud of the bidder against the contrary conclusion of the board in the matter, yet the state, in case of fraud or collusion by the board in the sale of school lands, may amply protect its rights by an action in equity based thereon, to set aside any fraudulent or collusive contract or conveyance of state property by the board to private individuals. But the state cannot do this in an action in mandamus, as to which the decision of the board is as conclusive against the state as against the purchaser.

Counsel for the state urge that plaintiff has mistaken his remedy, and should have used certiorari instead of mandamus. While this is but indirectly before us, yet in order to fully define plaintiff's rights under the record in this case, we are satisfied the acts of the board are not reviewable by certiorari on the application of the plaintiff. The tribunal whose acts would be so reviewed by certiorari acted entirely within its jurisdiction, and, so far as the facts in this case are concerned on the record, there is no cause for review, and certiorari will not lie.

The judgment of the District Court dismissing this action is affirmed. All concur.

**RACINE-SATTLEY MANUFACTURING COMPANY, a Corporation, v. JOS. W. PAVLICEK, Aneska Pavlicek, Vincent Pavlicek, and Sofia Pavlicek, Defendants. Sofia Pavlicek, Defendant and Respondent.**

(130 N. W. 228.)

**Judgment — Vacating — Procedure.**

1. Proper procedure for relief from default judgment, under § 6884, Revised Codes of 1905, is by motion to vacate the same based on an affidavit of merits and a proposed verified answer.

**Judgment — Vacating — Affidavit of Merits.**

2. On such an application the affidavit of merits cannot be controverted except as to matters therein stated other than that constituting the merits of the proposed defense.

**Appeal and Error — Vacating Void Judgment — Review — Testimony Taken After Ruling.**

3. On an appeal from an order vacating a default judgment, granted on such an application, only the order with the moving papers on which the same is based will be considered by this court. Testimony taken subsequent to the ruling appealed from cannot be considered with the moving papers on such an appeal.

**Appeal and Error — Vacating Default Judgment — Discretion.**

4. The ruling of the trial court on a motion to vacate a default judgment, made under said § 6884, will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court by said statute.

**Vacating Default Judgment — Proceedings — Discretion of Court.**

5. The exercise of the court's discretion on such an application should tend, in a reasonable degree, to bring about a trial on the merits, when the circumstances are such as to lead the court to hesitate upon the motion to open the default.

**Former Decisions Reviewed.**

6. Former decisions of this court, construing said § 6884, are collected and reviewed in the opinion.

Opinion filed January 30, 1911.

Appeal from the District Court of Stark county from an order vacating a default judgment made by *Crawford, J.*

Affirmed.

*Heffron & Baird*, for appellant.

One who would open a default judgment must, by affidavit, answer, or both, show a good defense on the merits, and excuse his failure to appear in the case. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381, 23 Cyc. Law & Proc. p. 930, note 32.

Ignorance only excuses in extreme cases. *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979.

*McFarlane & Murtha*, for respondent.

Motion to vacate is addressed to sound discretion, and ruling reversed only for abuse. *Rosebud Lumber Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042; *Meade County Bank v. Decker*, 19 S. D. 128, 102 N. W. 597; *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Minnesota Thresher Mfg. Co. v. Holtz*, 10 N. D. 16, 84 N. W. 581; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; *Weber v. Tschetter*, 1 S. D. 205, 46 N. W. 201; *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43.

Promise to suppress a criminal prosecution is no consideration. *Smith v. Steely*, 80 Iowa, 738, 45 N. W. 912; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Bryant v. Peck & W. Co.* 154 Mass. 460, 28 N. E. 678; *Haynes v. Rudd*, 83 N. Y. 251, 102 N. Y. 373, 55 Am. Rep. 815, 7 N. E. 287; *Hamilton v. Lockhart*, 158 Pa. 452, 27 Atl. 1077.

Goss, J. Plaintiff appeals from an order made March 6, 1909, vacating a judgment entered February 2, 1909, by default, for \$2,856, against several defendants, one of whom is the respondent. Personal service of summons and complaint was had on respondent on January 2, 1909; execution was levied on defendant's real estate on February 8th, and on February 19th, by her attorneys, motion was made to vacate said judgment, with leave to file answer, and on hearing granted. Such hearing was had on defendant's affidavit of merits and a proposed verified answer with supporting affidavit, and a plaintiff's counter affidavit controverting the affidavit of merits.

Plaintiff assigns such ruling as error, urging:

(1) No sufficient excuse is shown for defendant's default in failing to answer.

(2) That the affidavit and answer do not constitute a defense to plaintiff's cause of action.

(3) That the action of the trial court vacating the judgment was an unwarranted abuse of discretion.

We can summarize the affidavit of merit and answer into the following statement:

Respondent is foreign born and fifty-five years old, cannot speak or understand, read or write, English, and wholly unacquainted with business methods. In 1908, at her son's and plaintiff's solicitation, to save her son from criminal prosecution by the plaintiff, and for no other consideration, she executed a note for six hundred dollars (\$600), by making her cross for her signature thereon; that soon thereafter, because of such threats, she in like manner signed a note sued on, then supposing she was re-executing the \$600 note for the same purpose. After the service of summons and complaint upon her, she spoke to the son, for whom she signed the note, and he assured her that he would tend to the matter and see that no trouble came to her, and that she would not have to pay anything; that she did not know that these papers constituted the beginning of the lawsuit, or that she was required to answer or defend; and the first knowledge of this was on February 8th, when levy was made under execution against her property, at which time she learned from the sheriff, through an interpreter, that one of the notes she had signed by her mark had been for \$2,725, and was the note upon which this judgment was entered. On February 12th she came to Dickinson and consulted with and employed attorneys, and was by them advised of her rights in the premises; "that she has fully and truthfully disclosed to said attorneys all the facts and circumstances in regard to this matter, and that she is advised by said attorneys that she has a good, legal, just, and equitable defense to the cause of action of the plaintiff; that this application is made in good faith, and not made for purposes of delay."

Her proposed answer, verified by her attorney, sets forth purported defenses of want of consideration, execution of the note sued on under plaintiff's duress, occasioned by and through plaintiff's threats to prosecute her son for felony, forgery, if not so paid, and fraud alleged to have been practised upon her in obtaining the execution and delivery by her of said note.



Plaintiff at the hearing offered an affidavit controverting defendant's affidavit of merit, alleging that defendant is acquainted with and can speak English; that he was present and saw the respondent sign the note set forth in the complaint, and witnessed her signature thereto, and that she signed the same freely and voluntarily; that no threats toward her or her son were made; that no one stated to her that the note was only six hundred dollars (\$600); that the note executed was for \$2,725.

On hearing the trial judge granted respondent's motion, vacated the judgment, and granted her leave to serve and file an answer, upon the payment of \$50 term fees, which were tendered plaintiff's attorney and by him refused. This appeal was then perfected. Thereafter respondent was examined on plaintiff's application, under the provision of the statute relative to the examination of adverse parties before trial, and her testimony then taken was filed in this court, and, over respondent's objection, we are asked to pass upon the same in connection with the affidavit of merits and answer.

This court will not consider on this appeal any record other than that before the trial judge, on the motion and upon which the order appealed from was made. Plaintiff could have examined the defendant prior to the appeal and moved thereon the trial court to have set aside the order vacating the judgment, and reinstated the judgment in force, and from a denial thereof this court would have been in position to review such testimony of the defendant; but this court will not, on plaintiff's appeal, consider such testimony taken after the ruling appealed from was made. The appeal brings before us for review the order of the district court, together with the affidavits and pleadings upon which such order is based, and on such record the question of whether the trial judge committed an abuse of discretion in vacating the judgment.

Respondent invokes § 6884 of the Revised Codes of 1905 as her ground for asking that the default be set aside and she be permitted to answer. This statute provides that the court may "in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding." This statute has been so repeatedly construed by our own court that it is almost unnecessary to quote other authority than our own decision. The

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following cases all bear upon the same question or are involved in the construction of the statute quoted:

Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Nichells v. Nichells, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92; Olson v. Sargent County, 15 N. D. 146, 107 N. W. 43; Martin v. Potter, 15 N. D. 284, 107 N. W. 970; Hunt v. Swenson, 15 N. D. 512, 108 N. W. 41; Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A. (N.S.) 606, 116 N. W. 529; Schouweiler v. Allen, 17 N. D. 510, 117 N. W. 866; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A. (N.S.) 858, 126 N. W. 102, and Williams v. Fairmount School Dist. 21 N. D. —, 129 N. W. 1027.

As the questions involved in this case are often before trial courts for determination and that on varying facts and under different circumstances, each case depending more or less upon the facts and circumstances peculiar to it, in deciding the case before us it might be useful, so far as is necessary to decide the questions raised in this case, to review briefly the decisions of our court on this statute.

The procedure to obtain relief from a default judgment is by motion to vacate the same, with leave to answer on the merits. Proper practice requires this to be done by the service of an affidavit of merits and proposed answer, and the presentation of the same to the trial judge, with a motion to vacate the judgment with leave to answer. See Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381. The affidavit of merits is necessary in all cases when the application is made under the provisions of the statute quoted (§ 6884), and, in the absence of an allegation of fraud as a basis for

the vacation of the judgment, such motion is never granted without an affidavit of merits. *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381. A verified answer, however, may, in the discretion of the court, be deemed unnecessary and the judgment be vacated on an affidavit of merit technically correct. *Wheeler v. Castor*, supra. Where the affidavit of merit is insufficient and the answer unverified, it is error to vacate a judgment rendered by default; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80. An affidavit of merit should state facts, not conclusions, should be specific, positive, and not evasive or too general. *Marin v. Potter*, 15 N. D. 284, 107 N. W. 970. The application for vacation of the default must be seasonably made, and the question of whether it has been so made is a question for the determination of the trial court, in the exercise by it of the same discretion as is vested in it and that must govern it in determining all questions involved in such an application. *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75.

The affidavit of merit cannot be controverted as to facts therein recited, so far as the same purports to state the proposed defense on the merits. In *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 17, 84 N. W. 581, the court cites numerous authorities and lays down the rule for this jurisdiction that counter affidavits to the affidavit of merits are inadmissible to controvert the alleged merits of the defense, but are admissible as bearing on the facts submitted by the moving party as an excuse for his default in answer, or his delay or laches in making application for relief from the default judgment. In other words, the merits of the defense must be determined on the affidavit of merits and proposed answer outlining the issues proposed to be litigated, if a trial be granted; while the facts subsequent to the events constituting the merits, explaining the reasons for default in answer, the delay or laches in moving for vacation of a judgment, are properly triable on affidavits presented by either or both parties at the time of the hearing of the motion for vacation of judgment, and upon which affidavits the court must determine the preliminary question of whether the default shall be set aside, considering with such affidavits the proposed uncontrovertible prima facie defense set out in the affidavit of merits and proposed answer.

Plaintiff urges that defendant was guilty of laches in not answering the summons and complaint served January 2d, and in not moving to vacate prior to February 19th following the judgment entered by default on the intervening February 2d. Defendant received her first notice of the judgment February 8th, and employed attorneys February 12th, and one week thereafter, February 19th, served the motion to vacate on which these proceedings are before this court on appeal. "While the moving party has the burden of showing diligence, and, unless the same affirmatively appears, the court will not exercise its discretion" (Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381), yet under the same authority "a further reasonable period must elapse in which the advice of counsel could be sought and obtained. To this must be added a reasonable time for counsel to prepare and serve the papers after deciding upon a proper course to pursue in the case." More delay than in this case, in the making of application for relief from default, was held a matter for the decision of the trial court in its discretion, and, when permitted, sustained as not an abuse of discretion, in *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 386; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 17, 84 N. W. 581; *Olson v. Sargent County*, 15 N. D. 147, 107 N. W. 43. Under the promptness with which defendant acted after actual notice of judgment in this case, she was not guilty of laches, and the discretion of the court was not abused in entertaining her application so far as question of time was concerned.

The next question for consideration is regarding the sufficiency of the affidavit of merits and proposed answer, plaintiff's counsel contending that the court was not justified thereunder in vacating the judgment. The affidavit of merits with the proposed answer constitutes a prima facie defense when taken as true, as it must, inasmuch as it cannot be controverted so far as the merits of the defense are concerned, and amounts to a defense of want of consideration for the note, charging that the same was without other consideration than to suppress a criminal prosecution for felony. That a promise to suppress such a criminal prosecution will not support a promise to pay money, see *Smith v. Steely*, 80 Iowa, 738, 45 N. W. 912; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; 9 Cyc. Law & Proc. p. 505, and cases cited from many jurisdictions. That a want of consideration is a defense to a promise

sory note is elementary and has been so decided in *Andrews v. Schmidt*, 10 N. D. 1, 84 N. W. 568.

The affidavit of merits shows a *prima facie* defense, and invokes the discretion of the court as to whether to vacate the judgment and permit answer. Such discretion of the court is defined as follows: "In such cases the application invokes the sound judicial discretion of the court to which it is addressed, and in all such cases it is well settled that there can be no reversal of the ruling of the court below by a reviewing court, except where the court of review finds that the trial court abused the discretion vested in it by the law. The mere fact that the appellate court does not entirely agree with the court of original jurisdiction in its rulings does not suffice to show a cause of abuse of discretion within the meaning of the authorities." *Fargo v. Keeney*, and *Cline v. Duffy*, *supra*.

It is to be noticed that the statute in permitting pleading after time vests the court with "its discretion" in such matter, and it has been held "such an application does not rest upon any inflexible rule of law or strict legal right. In motions of this character the trial court exercises the powers of a court of equity." *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381. And "this discretion vested in trial courts is a broad one." *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92; *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43; *Colean Mfg. Co. v. Feckler*, 16 N. D. 227, 112 N. W. 993.

In case of doubt of propriety of granting an application, the discretion of the trial court will not be disturbed on appeal. "The exercise of the court's discretion ought to tend in a reasonable degree to bring about a judgment on the merits of the case, and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a rule, that the doubt should be resolved in favor of the application." 1 Black, *Judgm.* 2d ed. § 354; *Citizen's Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

In the light of the foregoing authorities from our own state, all in harmony, we must hold the affidavit of merits and verified answer were sufficient to invoke the favor and discretion of the trial court, and the trial judge committed no abuse of discretion in vacating the judg-

ment, with leave to answer. Accordingly the order appealed from is affirmed, with costs of this appeal taxed against the appellant. All concur.

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GERMAN MERCANTILE COMPANY v. JOHN METZ.

(130 N. W. 221.)

**Corporations — Note Given for Stock — Demurrer.**

Appellant brought suit on a promissory note. Respondent answered, alleging that the only consideration for the note was stock of appellant corporation; that he was not a subscriber to its capital stock; and that he had tendered back the shares, with notice of rescission, and demanded the return of the note. Appellant demurred to the answer as not stating a defense. *Held*, that in the light of the provisions of § 4198, Rev. Codes 1905, the demurrer should have been sustained.

Opinion filed February 8, 1911.

Appeal from the District Court of Stark county; *Crawford, J.*  
Reversed.

*Heffron & Baird*, for appellant.

A corporation can lawfully give credit to a purchaser of its stock. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; *Hacker v. National Oil Ref. Co.* 73 Pa. 97, 13 Mor. Min. Rep. 538; *Vermont C. R. Co. v. Claves*, 21 Vt. 30; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Pine River Bank v. Hodsdon*, 46 N. H. 114; *Selma & T. R. Co. v. Roundtree*, 7 Ala. 670; *Greenville & C. R. Co. v. Woodsides*, 5 Rich. L. 145, 55 Am. Dec. 708; *Little v. O'Brien*, 9 Mass. 423; *Leighty v. Susquehanna & W. Turnp. Co.* 14 Serg. & R. 434; *Centre & K. Turnp. Road Co. v. M'Conaby*, 16 Serg. & R. 140; *Boyd v. Peach Bottom R. Co.* 90 Pa. 169.

The law having fixed a penalty, courts can impose no other. *Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286; 19 Cyc. Law & Proc. pp. 23-26.

To enforce the note given for corporate stock is to protect stockholders and creditors. *Pine River Bank v. Hodsdon*, 46 N. H. 114.

*M. L. McBride*, for respondent.

**SPALDING, J.** This action was brought in justice court upon a promissory note for \$100 bearing date November 22, 1907, due one year from that date, with interest, given by the respondent to the plaintiff. Plaintiff is a domestic corporation. On the trial the defendant appeared and answered, admitting the making, delivery, and nonpayment of the note, and further alleged that the consideration of the note was ten shares of stock of plaintiff's corporation; that defendant was not a subscriber to the capital stock of plaintiff; and that on December 7th, 1908, he had tendered said shares of stock to the plaintiff, together with a written notice of rescission, and the defendant then demanded that his note be returned to him.

Plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense to its complaint. The justice of the peace overruled the demurrer. Plaintiff appealed to the district court on questions of law alone, and on April 13, 1909, that court entered an order sustaining the action of the justice court in overruling the demurrer. Plaintiff is in this court on appeal from the order of the court.

As we construe the answer, it was intended to show that the stock in question was not subscribed for at the time of or before the organization of the corporation, but that it was a purchase made from the corporation by the respondent subsequent to the organization being completed. The briefs of the parties discuss the power of a corporation, under the statute, to take notes for stock, and the rights of the parties in case a note is taken in payment for the issue of stock. We are unable to discover that any of these questions are involved on this appeal. The respondent did not answer, pleading that the stock was issued in excess of the amount authorized, but says that we must assume that the stock purchased was capital stock, which plaintiff had a right to issue, and that it was paid for by the note in question, and that the note was given for no other consideration and in no other way. The court, without pleadings before it which allege facts showing the unlawful issue of stock, or its unlawful sale, cannot assume that it was either unlawfully issued or unlawfully sold. We are therefore limited, in the consideration of this defense, to the provisions of the statute applicable to lawful sales of stock by a corporation after its organization. Sec. 4198, Rev. Codes 1905, reads: "Unless otherwise provided, a corporation

may purchase, hold, and transfer shares of its own stock from its surplus profits, or as provided in the article on assessments of stock, or by the unanimous consent in writing of all its stockholders, in such manner and for such price or consideration as the said stockholders may unanimously decide upon."

The answer contains nothing showing that the stock in question was not acquired under the provisions of the above section. Nothing is disclosed in the answer from which any proper inference can be drawn that the appellants' ownership of this stock, its sale and transfer, and the consideration received, were not all in exact accordance with law. To discuss any supposition that it was issued in excess of the authorized capital, or in any illegal manner, would be not only idle, but improper, under the allegations of the answer.

The District Court erred, and its order overruling the demurrer is reversed.

All concur, except MORGAN, Ch. J., not participating.

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SVEN HESKIN, K. T. Peterson, and Hans Kringlen, as the County Board of Drain Commissioners of Traill County, North Dakota, v. PETER HERBRANDSON, Ervin A. Anderson, Peter C. Smith, Karoline B. Howland, Herbrand Haugo, Matilda Swenson, Martin Hauge, Clara Vinge, Melvin O. Vinge, and Egger Vinge, Defendants. Peter Herbrandson, Ervin A. Anderson, Peter C. Smith, Katharine B. Howland, Appellants.

(130 N. W. 836.)

**Drains — Eminent Domain — Determining Compensation — Allowance of Benefits.**

1. Following the rule in *Ross v. Prante*, 17 N. D. 266, 115 N. W. 833, *held* that chapter 23, Revised Codes 1905, does not authorize the jury to consider the benefits to the tract of land about to be condemned, in determining full compensation. The duty of the jury is to ascertain the full damages. The benefits are to be determined by the board of drain commissioners.

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**Note.**—Procedure for establishment of drains and sewers, see note in 60 L.R.A. 161.



**Eminent Domain — Condemnatory Proceedings — Compensation.**

2. If, for any reason, the jury determines the amount of the said benefits, the trial court should disregard such determination as surplusage, and order judgment for the amount of the full damages, if the amounts can be separated.

**Eminent Domain — Condemnation Proceedings — Compensation — Allowing Benefits.**

3. In this case the jury found the full damages to the tract sought to be condemned, and made an independent finding as to the amount the tract was benefited. It was the duty of the trial court to order the entry of judgment for the amount of the full damages.

Opinion filed February 8, 1911.

Appeal from District Court, Traill county; *Pollock, J.*

Condemnation proceedings by Sven Heskin and others, as the county board of drain commissioners of Traill county, against Peter Herbrandson and others. From the award, certain defendants appeal.

Modified.

*P. G. Swenson and Engerud, Holt, & Frame*, for appellants.

*Theo. Kaldor and Charles A. Lyche*, for respondents.

BURKE, J. The plaintiffs, the board of drain commissioners of Traill county, North Dakota, prosecuted this action to condemn lands for a right of way for Mikkelson drain No. 13. The trial resulted in a finding by the court that there was a necessity for the drain, and a special finding by the jury determining in separate items the amount of the damages to the several tracts and also the amounts that each tract had been benefited by the drain. The proceedings are conceded to have been regular to this point. After the return of the findings by the jury, the board asked that judgment be entered in favor of the landowners for the *net* damages; to wit, the difference between the damages and the benefits; while the landowners contended that they were entitled to the full damages found by the jury, and that the determination of the benefits was a matter properly to be considered later by the board of drain commissioners. The trial court subtracted the amount of the benefits of each tract from the damages to said tract,

and ordered judgment entered for the difference. From this order an appeal has been taken to this court.

Section 1826, Revised Codes 1905, reads that "upon acquiring the right of way . . . [they, the drainage board] shall assess the per cent of the cost of constructing and maintaining such drain, etc.," and (§ 1831) "shall make a list showing the amount which each . . . tract of land benefited by the drain . . . is liable to pay, . . . and the auditor shall thereupon extend upon the tax lists as a special tax, . . . the several amounts shown by the drain commissioners' lists."

Construing the above sections, Judge Spalding, in the case of *Ross v. Prante*, 17 N. D. 266, 115 N. W. 833, says: "We are of the opinion that a fair construction of the drainage law warrants the conclusion that it was not contemplated that the question of benefits should be submitted to the jury. . . . We are fortified in the opinion by consideration of some reasons which appear clearly applicable. The benefits of a drain usually extend to land for several miles, and apply to different parties. If the jury were to consider the benefits applicable to the property of one owner alone . . . it would have to know the requirements necessary to carry off the water from the particular tract, and ascertain the size of the drain, its slope, and its length, the requirements of all the other tracts affected, and many other facts which it is utterly impracticable to present to a jury."

These, and other reasons advanced in said opinion, make it clear that the legislature did not intend that the jury in the condemnation suits should consider the benefits to the various tracts. If it were necessary to add to the reasons already given, is it possible to imagine a case where the benefits to one farm are greater than the entire cost of the drain? It will not be seriously contended that the owner of such farm must lose his award of damages for land taken, while his neighbors, not being parties to the suit because not touched by the drain, escape although equally benefited.

Any drain, if properly constructed, should yield benefits many times its cost. Lands many miles back are benefited. The owner of land taken for right of way is entitled to just compensation for the land taken from him, and he is not required to donate his benefits. If he pays his just proportion of the *cost of the drain*, he is entitled to all the new wealth created thereby upon his lands.

One other question arises. The drain board claims that submission of the question of benefits to the jury tended to confuse the issues, and resulted in a finding of excessive damages. This is only conjecture. This appeal is from the order of the trial court in entering judgment upon the verdict. No statement of the case has been settled, and the board has not appealed. The question is therefore not properly before us; but from the verdict we learn that the jury allowed \$35 per acre for the land actually taken, and additional amounts for damages done to the remaining farm. The verdict was probably well supported by evidence, and those amounts do not seem excessive.

The trial judge should have treated the finding of the jury as to the several items of benefits as surplusage, and ordered judgment for the full amounts of the damages found.

The order appealed from is modified to conform to this opinion.

Appellants will recover their costs.

All concur, except MORGAN, Ch. J., not participating.

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## JENS PAULSEN v. MODERN WOODMEN OF AMERICA.

(130 N. W. 231.)

### **Pleading — Amendment of Answer — Life Insurance — Suicide — Discretion — New Defense.**

1. In an action to recover on a beneficiary certificate, the sole issue was whether the insured committed suicide, which, under the terms of the insurance contract, exonerated the defendant society from liability. After the case was called for trial in the district court, defendant asked leave to amend its answer by alleging an additional and new defense predicated upon alleged fraud and breach of warranty on the part of the insured in effecting such insurance.

*Held*, for reasons stated in the opinion, that it was not an abuse of discretion to deny such motion.

### **Pleading — Amendment — Discretion.**

2. Trial courts are vested with a broad discretion in the matter of permitting or refusing amendments to pleadings, especially where, as in the case at bar, the proposed amendment, if granted, would necessitate a continuance of the cause over a term.

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Note.—Presumption as to suicide, see note in 35 L.R.A. 263.

**Life Insurance — Suicide — Question for Jury — Directed Verdict.**

3. It is stipulated as a fact that the insured came to his death by means of strychnine poisoning, but whether such strychnine was administered by deceased, and, if so, whether the same was thus administered with suicidal intent, is left to mere inference by the testimony, and was a question of fact for the jury, and not a question of law for the court to decide. It is accordingly held that the trial court properly denied defendant's motion for a directed verdict.

**Life Insurance — Suicide — Evidence — Presumption — Burden of Proof.**

4. The law presumes that the insured did not commit suicide, but that the strychnine was administered through accident or mistake, and the burden of proof is upon defendant to overcome such presumption.

**Trial — Question for Jury.**

5. Where a fact in issue rests solely upon inferences to be deduced from other facts, and it can be said that reasonable men might fairly differ as to the inferences to be deduced from all the circumstances disclosed, it is a proper case for the jury.

**Appeal and Error — New Trial.**

6. An appeal from a judgment alone is ineffectual to bring up for review an order made subsequent to judgment denying a new trial.

**Instructions — Exception — Review.**

7. Instructions not excepted to cannot be reviewed. The designation by counsel of certain portions of proposed instructions submitted to them pursuant to the provisions of § 7021, Rev. Codes 1905, is not equivalent to the taking of exceptions, as required in the following section.

Opinion filed February 10, 1911.

Appeal from District Court, Cass county, *Chas. A. Pollock, J.*  
Action by Jens Paulsen against Modern Woodmen of America,  
judgment in favor of plaintiff, defendant appeals.

Affirmed.

*Benjamin D. Smith* and *V. R. Lovell*, for appellant.

Amendments should be allowed to save rights and advance justice. *Coghlin v. Stetson*, 22 Blatchf. 88, 19 Fed. 727; *Conner v. Smith*, 74 Ala. 115; *Miller v. Metzger*, 16 Ill. 390; *Trego v. Lewis*, 58 Pa. 463; *Newberg v. Farmer*, 1 Wash. Terr. 183; *Milch v. Westchester F. Ins. Co.* 13 Misc. 231, 34 N. Y. Supp. 15; *Union Bank v. Ridgley*, 1 Harr. & G. 324.

Breach of warranty in application for life insurance is a valid de-

fense. 3 Cooley, Briefs on Insurance, 1950, and cases cited; Bacon, Ben. Soc. § 197; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; Modern Woodmen v. Van Wald, 6 Kan. App. 231, 49 Pac. 782; Baumgart v. Modern Woodmen, 85 Wis. 546, 55 N. W. 713; Genrow v. Modern Woodmen, 151 Mich. 250, 114 N. W. 1009.

Suicide as a defense to a claim for insurance may be shown by circumstantial evidence. Sovereign Camp, W. W. v. Haller, 24 Ind. App. 108, 56 N. E. 255; Germania L. Ins. Co. v. Ross-Lewin, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; Brignac v. Pacific Mut. L. Ins. Co. 112 La. 574, 66 L.R.A. 322, 36 So. 599; Supreme Tent, K. M. v. King, 73 C. C. A. 668, 142 Fed. 678; Lindahl v. Supreme Court, I. O. F. 100 Minn. 87, 8 L.R.A.(N.S.) 916, 117 Am. St. Rep. 666, 110 N. W. 358.

May be shown by a fair preponderance of the evidence. Kerr v. Modern Woodmen, 54 C. C. A. 655, 117 Fed. 593; Sharland v. Washington L. Ins. Co. 41 C. C. A. 307, 101 Fed. 206; Brown v. Sun L. Ins. Co. — Tenn. —, 51 L.R.A. 252, 57 S. W. 415; Knights of Pythias v. Steele, 107 Tenn. 1, 63 S. W. 1126; Bachmeyer v. Mutual Reserve Fund Life Asso. 87 Wis. 325, 58 N. W. 399; Agen v. Metropolitan L. Ins. Co. 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; Pagett v. Connecticut Mut. L. Ins. Co. 55 App. Div. 628, 66 N. Y. Supp. 804; Johns v. Northwestern Mut. Relief Asso. 90 Wis. 332, 41 L.R.A. 587, 63 N. W. 276; Sovereign Camp, W. W. v. Hruby, 70 Neb. 5, 96 N. W. 998; 1 Greenl. Ev. § 13a.

The presumption against death is a rebuttable one. Agen v. Metropolitan L. Ins. Co. 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; White v. Prudential Ins. Co. 120 App. Div. 260, 105 N. Y. Supp. 87; Supreme Tent, K. M. v. King, 73 C. C. A. 668, 142 Fed. 678; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; Somerville v. Knights Templars & M. Life Indemnity Asso. 11 App. D. C. 417; Johns v. Northwestern Mut. Relief Asso. 90 Wis. 332, 41 L.R.A. 587, 63 N. W. 276; Sackberger v. National Grand Lodge, I. O. T. L. 73 Mo. App. 38; Clement v. Clement, 113 Tenn. 40, 81 S. W. 1249; Cooley, Briefs on Insurance, 3256; Hardinger v. Modern Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; Clemens v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402, 8 A. & E. Ann. Cas. 1111.

A verdict based upon conjecture or mere possibility cannot stand. *Sovereign Camp, W. W. v. Haller*, 24 Ind. App. 108, 56 N. E. 255; *Sovereign Camp W. W. v. Hrubby*, 70 Neb. 5, 96 N. W. 998; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; *Leisenberg v. State*, 60 Neb. 628, 84 N. W. 6, 14 Am. Crim. Rep. 193.

If permitted to stand, it will be reversed on appeal. *Sovereign Camp, W. W. v. Haller*, 24 Ind. App. 108, 56 N. E. 255; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 76 Am. St. Rep. 905, 80 N. W. 1020; *Pagett v. Connecticut Mut. L. Ins. Co.* 55 App. Div. 628, 66 N. Y. Supp. 804; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *Supreme Lodge, K. H. v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523; *Johns v. Northwestern Mut. Relief Asso.* 90 Wis. 332, 41 L.R.A. 587, 63 N. W. 276; *Sovereign Camp, W. W. v. Hrubby*, 70 Neb. 5, 96 N. W. 998; *Supreme Tent, K. M. v. King*, 73 C. C. A. 668, 142 Fed. 678; *Zearfoss v. Switchmen's Union*, 102 Minn. 56, 112 N. W. 1044; *Germania L. Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *White v. Prudential Ins. Co.* 120 App. Div. 260, 105 N. Y. Supp. 87; *Mutual L. Ins. Co. v. Hayward*, —Tex. Civ. App. —, 27 S. W. 36; *Sovereign Camp, W. W. v. Thiebaud*, 65 Kan. 332, 69 Pac. 348.

*Engerud, Holt & Frame*, for respondents.

What inference shall be deduced from circumstantial evidence is for the jury, not the court. *Stevens v. Continental Casualty Co.* 12 N. D. 463, 97 N. W. 862; *Knights Templars & M. Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Courtemanche v. Supreme Court, I. O. F.* 136 Mich. 30, 64 L.R.A. 668, 112 Am. St. Rep. 345, 98 N. W. 749; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Dischner v. Piqua Mut. Aid & Acci. Asso.* 14 S. D. 436, 85 N. W. 999; *Ætna L. Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Hale v. Life Indemnity & Invest. Co.* 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108; *Harms v. Metropolitan L. Ins. Co.* 67 App. Div. 139, 73 N. Y. Supp. 513; *Goldschmidt v. Mutual L. Ins. Co.* 35 N. Y. S. R. 121, 12 N. Y. Supp. 866; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660.

Presumption is against suicide; and circumstances must be suffi-

ciently strong to overcome it. *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402, 8 A. & E. Ann. Cas. 1111; *Modern Woodmen v. Kozak*, 63 Neb. 146, 88 N. W. 248; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L.R.A. 589, 49 Am. St. Rep. 348, 15 So. 388; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Travellers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110.

Suicide must be intentional self-destruction. *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660.

FISK, J. This is an appeal from a judgment of the district court of Cass county. The action was brought to recover the sum of \$2,000 and interest claimed to be due plaintiff under a beneficiary certificate issued by defendant to one Soren Peter Paulsen in due form in the year 1906; and at the time of the death of said Paulsen, which took place on May 16, 1907, the plaintiff was the beneficiary named in such certificate. The complaint is in the usual form, alleging the issuance of such beneficiary certificate, wherein and whereby defendant promised and agreed, in consideration of the payment of certain dues and assessments by said Paulsen to defendant, to pay to the beneficiary named therein in the event of the death of said Paulsen while a member of said defendant society in good standing, the sum of \$2,000, upon the presentation to it of proofs of the death of the insured; that the said insured during his life complied with all conditions and requirements of such contract on his part to be kept and performed and that in due time proofs of death were duly made to the defendant, but that it refuses to pay to the plaintiff, as beneficiary, any part of the sum thus agreed to be paid by the terms of such contract of insurance.

The answer admits the issuance of the benefit certificate mentioned in the complaint, as therein alleged. The answer then alleges that its by-laws and application for membership form a part of such contract of insurance, and that § 65 of its by-laws provides: "If any member of this society, holding a benefit certificate heretofore or hereafter issued, shall, within three years after becoming a beneficial member of this society, die by his own hand, except by accident, whether sane or

insane, . . . his benefit certificate shall thereby become null and void, . . ."

The answer then alleges, "that, within three years after becoming a beneficial member of this society, he, the said Soren P. Paulsen, came to his death by his own hand; that is to say, his death was caused by strychnine administered by his own hand, and not by accident; and he thereby did end his life, by reason whereof the said benefit certificate herein sued on became absolutely null and void, and this defendant was thereby released from any and all liability thereon."

It will thus be seen that the sole issue was whether the insured committed suicide. The facts are practically all stipulated. At the trial plaintiff offered in evidence the benefit certificate, together with the application therefor; also those portions of the stipulated facts showing the death of Soren P. Paulsen, as alleged, and that due proofs of death were submitted to defendant by plaintiff, and rested. Whereupon defendant offered in evidence the entire stipulations of fact, and rested. Whereupon both parties moved for a directed verdict, and each motion was denied and the cause submitted to the jury pursuant to written instructions of the trial judge, and a verdict returned in plaintiff's favor for the amount prayed for in the complaint. Thereafter, and on December 10, 1908, judgment was duly rendered and given in plaintiff's favor on such verdict, from which judgment defendant appeals.

Appellant assigns error as follows:

(1) The court erred in refusing to permit the defendant to serve and file amended answer setting up the second affirmative ground for defense.

(2) The court erred in refusing to grant defendant's motion to postpone the case over the term.

(3) The court erred in denying defendant's motion to instruct the jury to return a verdict in its behalf.

(4) The court erred in submitting the case to the jury for determination.

(5) The court erred in overruling defendant's motion for a new trial.

(6) The court erred in instructing the jury: "If you conclude from the evidence that Paulsen knowingly swallowed the strychnine,



then you must determine from the evidence whether he took it knowing it to be poison, and with the intent to end his life. If he swallowed the poison by mistake, or if he took an overdose by mistake, then it would not be suicide or self-destruction within the meaning of this contract of insurance."

Respondent, by way of a preliminary motion, has raised several practice questions, and counsel have stipulated that such preliminary motion may be submitted with the merits of the cause. In view of the conclusion reached on the merits, we shall not take the time necessary to a decision of the practice questions raised by such motion, as it would serve no useful purpose at this time.

Appellant's first two assignments of error may be considered together, as they relate to the ruling of the court in denying leave to amend the answer and continue the case over the term. We are entirely clear that these assignments are without merit. Concededly a continuance was necessary, but only necessary in the event an amendment to the answer, as prayed for, was permitted. The proposed amendment would introduce a wholly new defense. The motion was not made until about the time the case was called for trial. Furthermore, no sufficient excuse was offered for the failure to plead such new defense in its original answer, or for its delay in moving to amend after acquiring knowledge of the facts constituting its alleged new defense. The affidavit on which such motion was based reveals the fact of such knowledge on defendant's part for at least several months before the trial. Diligence in making such motion was essential, and the apparent lack of such diligence, together with the want of any valid excuse therefor, was alone sufficient to warrant the ruling complained of. The contention that such delay was excused by the conduct of plaintiff's counsel is not tenable. The utmost that can properly be claimed is that the letter written by plaintiff's attorney furnished a valid excuse for a portion of such delay. Moreover, a conclusive answer to appellant's contention is the fact that the affidavit used as a basis for the motion, in so far as it purports to set forth facts in support of the additional defense of fraud and breach of warranty, is upon information and belief merely, without any attempt to state the sources of such information or belief; nor is it shown with any degree of certainty that the depositions of the wit-

21 N. D.—16.

nesses, if taken, would prove or tend to prove the new defense sought to be pleaded. In the light of such showing, we decline to hold that the trial court abused the discretion vested in it in such cases. It is firmly settled that such discretion is very broad, and its exercise will not be interfered with except in a clear case of an abuse thereof.

This brings us to appellant's third assignment, which is predicated upon the ruling denying its motion for a directed verdict.

Under the issues as narrowed by the stipulations but one controverted question remained for determination, *viz.*: Did the insured commit suicide by intentionally taking strychnine, or was it a case of accidental poisoning? That deceased came to his death by strychnine poisoning is expressly stipulated as a fact, but there is no direct proof as to how, why, or with what intent, such poison was administered, or by whom the same was administered. All these important matters are left wholly to inference from the circumstances surrounding Paulsen's death, as disclosed in the record. Briefly stated the circumstances are these: On the evening preceding his death, deceased was arrested at his cabin, which located in a canyon in the Gallatin basin, Montana. Such arrest was made by one Ferguson, a deputy game warden of Gallatin county, and one Sales, undersheriff of said county. The cause for such arrest is not stated, but presumably it was for infraction of the game laws of Montana. What took place after the arrest was narrated by the witnesses at the coroner's inquest, in substance, as follows: The officers, together with Paulsen and one Bartholomew, started down the canyon, and, after driving a short distance, Paulsen was required to alight from the vehicle, and his pockets and person were searched by the deputy game warden, and he found nothing except some elks' teeth, and he testified that if he had any strychnine it must have been concealed in his shoes. They then continued their journey to Burrows's place, where they had supper, and about 10:30 the officers and Paulsen went to bed in a room containing two beds, the officers sleeping in one bed and Paulsen in the other bed, just across, but in reach of them. Paulsen ate a big supper, and was apparently in good spirits during the evening. About one and a half hours after retiring, Ferguson was awakened by moans, and found Paulsen in convulsions. He asked him what was the matter, and he couldn't get very much information from him,

but Paulsen said it would be all right pretty soon. On being asked if it was pleurisy that was paining him he answered, "Yes." These convulsions continued at brief intervals until about 1:30 o'clock the next morning, when he died. During one of the convulsions, he requested Bartholomew to "put a bullet through me, please," and then asked for a drink of water. The witness Bartholomew had been acquainted with Paulsen for some time prior thereto, and testified that he seemed to be contented and quite happy, and never had said anything about committing suicide. After the body was removed, a vial containing strychnine was found under the bed occupied by Paulsen.

As before stated, the only evidence offered consisted of the stipulations and the written testimony taken at the coroner's inquest, which testimony was read pursuant to stipulation. The vital question is, therefore, whether, as appellant contends, the circumstances conclusively established suicide as a matter of law. If this question must be answered in the affirmative, it follows as a necessary conclusion that the court erred in submitting the case to the jury. In deciding this question we are controlled by certain well-established rules. The presumption is that Paulsen did not commit suicide, but that the strychnine was administered through accident or mistake. *Soules v. Brotherhood of American Yeoman*, 19 N. D. 23, 120 N. W. 760; *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402, 8 A. & E. Ann. Cas. 1111; *Stevens v. Continental Casualty Co.* 12 N. D. 463, 97 N. W. 862, and cases cited. And the burden is on defendant to overcome such presumption. Ordinarily the question of what inferences are deducible from the evidence is peculiarly a question for the jury, and it is only in rare instances that the court is justified in determining such question as a matter of law. If it can be said that reasonable men may fairly differ as to the inferences to be deduced from all the circumstances disclosed, it is a proper case for the jury. *Stevens v. Continental Casualty Co.* *supra*.

As said by the supreme judicial court of Massachusetts, "It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences; it

is only when no inferences are possible, except those which lead to one conclusion, that the jury can be required to find a proposition affirmatively established." *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973.

Applying the foregoing rules or tests to the facts in the case at bar, we are constrained to hold, as did the trial court, that the question was one of fact for the jury, and not one of law for the court to decide. While, if we were the triers of the facts, our decision might have been contrary to that of the jury, we are not prepared to say that but one conclusion or inference could properly be deduced from the facts. This being true, our duty is plain under the law. See authorities above cited.

Appellant's fourth assignment presents the same point as the preceding assignment.

The fifth assignment challenges the correctness of the order denying defendant's motion for a new trial. Such ruling is not properly before us for review, for the manifest reason that such order was made long after judgment, and the appeal is from the judgment alone. It needs no argument in support of the proposition that an appeal from the judgment is ineffectual to bring up for review orders made subsequent to such judgment. This court has expressly settled this question in this state. *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276.

The next and last assignment of error challenges the correctness of a certain portion of the instructions to the jury. We are powerless to consider this assignment, for the obvious reason that no exception was taken to the giving of the instruction complained of. Appellant evidently proceeded upon the theory that where, pursuant to the provisions of § 7021, Rev. Codes 1905, the trial court requires counsel to designate the parts of the proposed instructions which he deems improper or objectionable, and counsel designates such objections accordingly, that this is equivalent to taking an exception to the giving of such instructions. The statute is not susceptible of such a construction. That portion of § 7021 applicable to the point here under consideration reads as follows: "The court may . . . submit the written instructions, which it proposes to give . . . , to counsel . . . for examination, and require such counsel, after a reasonable examination there-

of, to designate such parts thereof as he may deem objectionable; and such counsel must thereupon designate such parts of such instructions as he may deem improper, *and thereafter only such parts so designated shall be excepted to* by the counsel so designating the same." The portion of the statute which we have italicized clearly contemplates that exceptions shall be preserved as provided in the next section, and that the only objects which the legislature had in view were to enable the court to become apprised of the portion of the proposed instructions which were deemed objectionable, and to restrict counsel, in filing exceptions, to the portions of the instructions thus designated as objectionable. For the above reasons it would be improper to express any opinion as to the correctness of the instruction thus challenged.

This disposes of all of the assignments, and, finding no error, the judgment appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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## FRANCES MARIAN WAGAR v. HELEN PRINDEVILLE.

(130 N. W. 224.)

### **Voters and Elections — Words and Phrases — Qualified Electors.**

1. Qualified electors, as defined by § 121 of the Constitution, are male persons only, possessing the other qualifications therein enumerated.

### **Voters and Elections — Qualified Electors — Women.**

2. Women entitled to vote for school officers under the provisions of § 128 of the Constitution constitute a class separate from electors, as above defined, and only possess a limited elective franchise.

### **Voters and Elections — Registration — Women Voters.**

3. The provisions of the registration law of this state contained in §§ 732 to 746, both inclusive, Rev. Codes 1905, do not require women to register or furnish an affidavit, as required of electors who are not registered, to entitle them to vote for school officers.

Opinion filed February 10, 1911.

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Note.—Right of women to vote, see note in 21 L.R.A. 662; and note in 27 L.R.A. (N.S.) 522.

Appeal from District Court, Grand Forks county; *Templeton, J.*

Action by Frances Marian Wagar against Helen Prendeville.  
Judgment for defendant and plaintiff appeals.

Affirmed.

*B. G. Skulason*, for appellant.

None but registered voters can vote. *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95.

Legislature can regulate elections. *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Cooley*, Const. Lim. 6th ed. 756; *McCrary*, Elections, §§ 92 et seq.; *Pitkin v. McNair*, 56 Barb. 75; *State ex rel. Woodson v. Brassfield*, 67 Mo. 331; 15 Cyc. Law & Proc. p. 302, and cases cited.

Legislature must provide for carrying out provisions of Constitution conferring suffrage upon women. *Gilkey v. McKinley*, 75 Wis. 542, 44 N. W. 762; *People ex rel. Ahrens v. English*, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678; *Cooley*, Const. Lim. 6th ed. 98; *State, Ransom, Prosecutor, v. Black*, 54 N. J. L. 446, 16 L.R.A. 769, 24 Atl. 489, 1021; *State ex rel. Ohlquist v. Swan*, 1 N. D. 5, 44 N. W. 492; *Roesler v. Taylor*, 3 N. D. 546, 58 N. W. 342; *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577.

Registration laws must treat male and female alike, or it is discriminatory and unconstitutional. N. D. Const. § 11; *Cooley*, Const. Lim. supra; *Lyman v. Martin*, 2 Utah, 136; *Morris v. Powell*, 125 Ind. 281, 9 L.R.A. 326, 25 N. E. 221; *Atty. Gen. ex rel. Conely v. Detroit*, 78 Mich. 545, 7 L.R.A. 99, 18 Am. St. Rep. 458, 44 N. W. 388; *Brewer v. McClelland*, 144 Ind. 423, 17 L.R.A. 845, 32 N. E. 299.

*Guy C. H. Corliss*, for respondent.

Registration law relates exclusively to "qualified electors." Rev. Codes 1905, §§ 733, 738.

Every male voter shall be a qualified elector. Rev. Codes 1905, § 605.

Election laws are construed most favorably to the right of the voter. *Montgomery v. Henry*, 1 L.R.A. (N.S.) 656; *State ex rel. Law v. Saxon*, 30 Fla. 668, 18 L.R.A. 721, 32 Am. St. Rep. 46, 12 So. 218; *Lynip v. Buckner*, 22 Nev. 426, 30 L.R.A. 354, 41 Pac. 762; *Owens v. State*, 64 Tex. 500; 10 Am. & Eng. Enc. Law, 2d ed. p. 589.

Voter is not bound to investigate whether he is registered or not. *State ex rel. Wood v. Baker*, 38 Wis. 87.

Voters need only to find at the polls acting inspectors, with actual registers; they need look no farther. *State ex rel. Wood v. Baker*, *supra*; *Farren v. Buffalo County*, 5 Dak. 36, 37 N. W. 756; *Dale v. Irwin*, 78 Ill. 170; *Clark v. Robinson*, 88 Ill. 498; *State ex rel. Quinn v. Lattimore*, 120 N. C. 426, 58 Am. St. Rep. 797, 26 S. E. 638; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Tullos v. Lane*, 45 La. Ann. 333, 12 So. 508; *Sumner v. McKee*, 89 Ill. 127; *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997; *State ex rel. De Berry v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545; *Wilson v. Bartlett*, 7 Idaho, 271, 62 Pac. 416; *White v. Multnomah County*, 13 Or. 317, 57 Am. Rep. 20, 10 Pac. 484; *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; *Choisser v. York*, 211 Ill. 56, 71 N. E. 940; *Payne, Elections*, §§ 360, 361, 363; *State ex rel. Quinn v. Lattimore*, 120 N. C. 426, 58 Am. St. Rep. 797, 26 S. E. 640.

SPALDING, J. This is an appeal from the judgment of the district court of Grand Forks county, adjudging that the plaintiff was not elected to the office of county superintendent of schools of that county at the 1910 election, and that her contest against the defendant be dismissed upon the merits, and with prejudice. Plaintiff and defendant were candidates for election as county superintendent of schools of Grand Forks county at the general election of November, 1910. The canvassing board found that the plaintiff had received 3,044 votes and the defendant 3,118, and the county auditor issued a certificate of election to the defendant. In the city of Grand Forks there were cast at that election, by women, 399 votes for plaintiff and 589 votes for the defendant. None of such women voters were registered, and none of them made any affidavit of qualification as voters. A contest was brought by the plaintiff, based upon the claim that such women had no right to vote unless registered, without furnishing the affidavit required by § 738, Rev. Codes 1905, and it is claimed by appellant that none of the votes cast by women should be counted. If such votes were thrown out it would leave plaintiff a majority of 116 votes.

The trial court held in favor of the defendant, on the ground that the law does not require the registration of women voters, and the cor-

rectness of this conclusion is the only question which we need consider. The law regarding registration of voters is contained in §§ 732 to 746, both inclusive, Rev. Codes 1905. Section 732 provides that the election officers shall, on certain dates, "make a list, as hereinafter prescribed, of all persons qualified to vote at the ensuing election in such election precinct, which list, when completed, shall constitute and be known as the register of electors of such precinct." Section 733 provides that such registers shall each contain a list of qualified electors of such precinct, etc. Section 734 provides a method for preparing such list in new precincts, and that it shall only embrace the names of such persons as are known to them (the board of registry) to be electors in their precinct, or proved to be such, etc. Section 737 provides how any electors residing in a precinct and entitled to vote therein may have his name recorded in such list. Section 738 provides for the certifying of the list prepared by the board of registry as a correct list of the qualified electors of the precinct, so far as known, and what shall be done with it. From these provisions and from a consideration of the whole article relating to registration, it is clear to us that no registration is contemplated except of electors.

The registry law was enacted in 1881, when women were not eligible to school offices and were not entitled to vote on school questions, as they may do at the present time. If women are included within the definition of electors, they are required to register. Section 121 of the Constitution provides the first definition of that word, and defines qualified electors as male persons of the age of twenty-one years or upwards, belonging to either of certain classes; thereby excluding women from the electorate. Section 128 of the Constitution, which contains the provision relied upon by the appellant to bring women within the terms of the registration law, reads: "Any women having the qualifications enumerated in § 121 of this article as to age, residence, and citizenship, and including those now qualified by the laws of the territory, may vote for all school officers, and upon all questions pertaining solely to school matters, and be eligible to any school office." This does not make them electors, but places them in a separate class of citizens, and entitles them to vote on the questions specified only. They are thereby vested with a limited elective franchise, but are not electors within the terms of § 121, *supra*.



Section 799, Rev. Code 1905, also classifies persons entitled to vote for school officers into two classes, namely, all persons who are qualified under the general laws of the state, and all women twenty-one years of age and having the necessary qualifications as to citizenship and residence required of male voters by law, and make them qualified voters for school officers and eligible to the office of county superintendent of schools, school director, member of the board of education, or school treasurer. These provisions all seem to contemplate placing women who are entitled to vote in a class separate and apart from the men, and the registry law contains nothing in conflict with these provisions. The foregoing references clearly indicate that the registry law is only applicable to males.

Our conclusion is supported by other considerations. The main qualification for holding office in this state is that the person be a qualified elector. If this term is applicable to women, they are entitled to hold the office of state senator, member of the house of representatives, governor, lieutenant governor, judge of the supreme court, and various other offices. Constitution, §§ 28, 34, 73, 82, and 90. This court has recently defined the meaning of the term "qualified elector," as used in § 121 of the Constitution. See *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 35, 119 N. W. 360.

Finding no error, the judgment of the District Court is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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## ARTHUR N. KANE v. SIDNEY F. SHERMAN.

(130 N. W. 222.)

### Brokers — Contract — Pleading.

1. Before a broker can recover for services as such, he must plead and sustain a contract of employment, express or implied.

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**Note.**—What constitutes employment of real estate broker which will entitle him to commissions otherwise earned, see note in 27 L.R.A. (N.S.) 786.

**Brokers — Contract — Evidence.**

2. Evidence in this case does not show such a contract, and the trial court properly directed the jury to find for the defendant.

Opinion filed February 11, 1911.

Appeal from the District Court, Cass county; *Pollock, J.*

Action by Arthur N. Kane against Sidney F. Sherman. Judgment for defendant, and plaintiff appeals.

Affirmed.

*Edward H. Wright and Turner & Murphy*, for appellant.

*Robert M. Pollock and Pollock & Pollock*, for respondent.

BURKE, J. During the times hereinafter mentioned, plaintiff was a real-estate dealer and broker living at St. Paul, Minnesota, and the defendant was engaged in a similar business at Tower City, North Dakota.

For convenience we will designate them K. and S., respectively. Their transactions began November 19, 1906, when S. wrote a letter to K., probably in answer to an advertisement that K. was then running in one of the Twin City papers, offering to trade city property for North Dakota farm lands. This letter probably also contained Exhibit B, hereinafter referred to. This letter reads as follows: "Have you any St. Paul or Minneapolis property to exchange for improved farm lands in North Dakota? I have several hundred acres of good land in this vicinity, accumulated during several years' land business, and am now contemplating moving to Minneapolis in a different line of business. I could handle such property from there better than my farm lands, and if a good trade could be made, would consider it. Something worth \$50,000 to \$75,000 would be as large a deal as I would care to handle. Would expect to put in the lands at their actual value. If you have anything in this line, I will be pleased to hear from you."

November 20, 1906, K. replied: "Replying to your favor of the 19th inst., will say that I have a client here in St. Paul who owns a good flat property in Minneapolis near the University, with a rental of \$7,500 a year, that he will exchange for good cheap lands either im-

proved or wild, if a reasonable exchange can be made. If you will send me a list of your lands, giving prices, encumbrances, etc., I will try to submit a proposition to you that will be satisfactory."

November 26, 1906, S. replied, inclosing a list of his lands, and saying: "If the property which you mention is good, and the owner of the same will consider a trade, I will be glad to have you give me a full description of the property." K. did not reply, and on December 24, 1906, S. wrote to him again, saying: "On November 21st I sent you a list of the lands which I wished to trade for city property. Please advise if same has been received, and if so, what the prospects are for doing business with you."

December 26, 1906, K. replied: ". . . I have been offered a large flat property in Minneapolis, as per inclosed statement, . . . if you care to consider a deal, will be pleased to take it up with the other party."

On January 3, 1907, S. replied, inquiring about the flats, and adding, "When you have taken the matter up with your parties let me know, etc." Then followed several letters consisting of inquiries and answers as to the two properties and the terms upon which a trade might be made, and about January 26, 1907, S. went to St. Paul to close a trade. It was then discovered that K.'s party did not own the property in Minneapolis, and S. returned to North Dakota. The following day K. wrote to him: "I am sorry there was a snag in the Minneapolis property. . . . Do you intend to go ahead and make a trade if you can find something satisfactory? If so I will be glad to see what I can find, and the next time you are in the cities you can look them over. . . . I looked around St. Paul yesterday and found a business property, the Court Block, and got into touch with the real owner. . . ."

January 28, 1907, S. answered: "Am open for any reasonable proposition. . . . Give me a full description of the Court Block." This was followed by a lengthy correspondence concerning said property and the terms of trade. This correspondence, consisting of some thirty letters, is too long to reproduce here, especially as all of the letters were dated after November, 1906, and could not contain a contract made in that month; their only use being to show whether the parties themselves understood that a contract had in fact been made in November. We

have carefully examined this correspondence, and find that it contains no mention of such a contract, excepting in the extracts that we have set forth in this opinion.

April 17, 1907, S. received from K. this telegram: "Come down to-night. Party returns with you. Deal depends on lands." S. replied by wire: "As deal depends on lands, no need for me to go down now. Send your party out, I will show lands; if satisfactory, will return with him." The owner of the Court Block sent his brother to inspect the lands, which led to S. going to St. Paul about May 6, 1907, where he met K. and the owner of the Court Block, a Mr. Davidson, and inspected the Court Block, but made no agreement relative to a trade. S. went to his hotel that evening and wrote two letters, one to K. and one to Mr. Davidson. To K. he wrote: "Since leaving your office this afternoon, I have come to the conclusion that it is best to drop the Court Block trade entirely." To Mr. Davidson he wrote, saying that he had written to K., and adding: "He represented to me that you were ready to close the matter practically upon the option given you, and I was induced to come to St. Paul on such representation. While he may have acted in all honesty in his belief in the statement, it has nevertheless put me to needless inconvenience. Should you desire to take the matter up with me direct, I shall be glad to have you do so." Mr. Davidson then took the matter up direct with S., and six days later finally reached an agreement to trade, though on materially different terms than had been mentioned in the correspondence between S. and K., S. having added 160 acres to the lands traded, and paying more cash. Davidson in return allowed to S. two thirds of the 1907 crops upon the lands.

At the trial K. was asked his understanding of his contract with S., and testified as follows:

Q. And you were employed by him by virtue of this letter which he wrote you November 19?

Ans. Yes.

Q. And you want it understood that you were working for Mr. Sherman when you wrote the letter of November 20, 1906?

Ans. Yes.

Q. This is the contract, is it?

Ans. Yes, I considered that the employment continued from that time up to the time the Court Block was purchased by Mr. Sherman.

S. was called for cross-examination under the statute, and admitted the writing of the letters introduced in evidence; admitted having probably inclosed Exhibit B in one of his letters to K., and explained that Exhibit B was a copy of a circular letter that he had prepared some time previous, and had been inclosing in his letters to eastern correspondents.

As this circular probably was inclosed in a letter written in November, we will set it out in full.

### Exhibit B.

Tower City, North Dakota.

Dear Sir:—

I want you to find me a buyer for a 440-acre farm in eastern Barnes county, North Dakota. This farm has 400 acres under cultivation . . . is within 1 mile of a good town on the main line of the N. P. Railway. . . . The price is \$45 per acre; and \$6,000 cash will handle it, balance on reasonable terms. . . . If you know of anyone looking for a good farm home, don't hesitate sending him out to me on this proposition. . . . This quotation is subject to prior sale without notice. . . . I will pay a cash commission of \$500, the railroad fare, and expenses of agent and buyer, if you send or bring me a purchaser who buys the farm of me on those terms, or, if necessary, I can probably arrange to protect you \$1. per acre additional to the price quoted. Get me a buyer, and you will not regret it, nor will the buyer regret that he has bought the farm. It is a bargain.

I have other good propositions, and if you have farm buyers, for actual settlement or for investment, let me know what you want, and I will match same.

Yours for business,

S. F. Sherman.

First Nat'l Bank Bldg.

Kane brought this suit for \$2,146.50, being \$1 an acre for the land that Sherman had traded to Davidson, and in his complaint alleges that

in November, 1906, S. employed him as a broker to exchange said lands for city property in St. Paul or Minneapolis, and that said S. had agreed to pay him a reasonable commission for his services in effecting the exchange. A trial was had to a jury, the correspondence mentioned above was admitted without objection, and oral testimony taken. There was no dispute as to the facts, as the defendant offered no testimony. At the close of the plaintiff's testimony, the court directed the jury to find for the defendant. This appeal is from the judgment resulting.

We think the trial judge was correct. It is elementary that a broker has no superior rights, as such, to collect for his services, but must allege and prove a contract, express or implied. 19 Cyc. Law & Proc. p. 190.

There was no express contract shown; if there was any contract it must be implied from the letters of Sherman written in November, 1906, in which month Kane claims the contract was made. Did S. so conduct himself that the law will step in and say that he has agreed by implication to pay K. a commission? To answer this question, we must look at the circumstances surrounding the parties at that time. The first letter of S. was probably suggested by the advertisement that K. was running in the Twin City papers, to the effect that he had city property to trade for North Dakota farm lands. Kane's first letter stated that he (K.) *has a client* who has a flat to trade. Those parties had never seen each other or spoken to each other in November, 1906, and the letters above cannot possibly support any contract, even by implication.

December 24, 1906, S. wrote to K., "What are the prospects of doing business *with you?*" and again, January 3, 1907, "When you have taken up the proposition with *your parties*, let me know." We have added italics.

These statements are inconsistent with plaintiff's theory.

We cannot see that Exhibit B bears upon this case. It was a copy of a circular, inclosed with a regular letter; it related to land not owned by S., but by a farmer client of his; it stated in positive terms the commission that S. would pay for making that particular sale. It was in fact notice to K. that S. wanted all agreements as to commissions made in advance of the services, and that he would pay no other. K. had no right to foist services worth \$2,146.50 upon S. upon so slight an invi-

tation. If he considered himself employed on and after November 19, 1906, as he testifies, it was his duty to inform S. of that fact, and reach some positive agreement as to the amount of his compensation. Not having done so, S. had a right to treat him as a principal, or as an agent of some undisclosed principal. We think the correspondence shows that S. did so consider him.

As plaintiff has failed to substantiate the material allegation of his complaint, the trial court properly directed the jury to find against him. Judgment affirmed.

All concur, except MORGAN, Ch. J., not participating.

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## E. A. WADSWORTH v. C. R. OWENS.

(130 N. W. 932.)

### **Landlord and Tenant—Holding Over—Right of Lessee.**

1. The defendant leased of plaintiff certain real estate for the season of 1905. At the request of the plaintiff, defendant remained upon the premises during the winter of 1905 and 1906. Without any new agreement the plaintiff furnished seed, and the defendant sowed it and cropped the same premises in 1906.

*Held*, that § 5531, Rev. Codes 1905, providing that "if a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year," applies; and that the defendant's rights in the premises and crops for 1906 were governed by the contract in writing made for the year 1905; and that this rule is not abrogated by the fact that, after having accepted the seed from the plaintiff and sowed it, the defendant refused to execute a new contract in terms like the old one.

### **Landlord and Tenant—Leases—Renewal of Contract—Evidence.**

2. The acceptance of rent, as referred to in § 5531, only operates as evidence that the landlord consents to the renewal or extension of the contract; and where the evidence is adequate to establish the fact of such consent without his having received rent, the receipt or failure to receive rent is not material.

### **Landlord and Tenant—Landlord May Treat Hold-Over Tenant as Trespasser or Lessee.**

3. The landlord may elect, when a tenant continues in possession after the expiration of his lease, to treat the tenant as a trespasser, or as holding under the lease of the former year.

**Claim and Delivery — Right of Action — Crops.**

4. The parties to this action agreed that the value of the crop involved was \$2,500. The contract under which the defendant held reserved the title to all such crop in the plaintiff, and the defendant agreed therein not to sell or remove any of such crop until a division thereof, without written consent of the plaintiff, and not until all of his covenants and agreements contained in the lease should be fulfilled; and that the plaintiff should have the right to take and hold enough of such crop that would, on a division of the same, belong to the defendant, to repay any and all advances made to him. The evidence shows that the defendant was disposing of the crop without having fulfilled the terms of the contract, and that he asserted title thereto superior and adverse to that of the plaintiff. In a replevin action a verdict was returned to the effect that the defendant's interest in the crop was \$700, and against the plaintiff.

*Held*, that a verdict in favor of the plaintiff should have been directed.

Opinion filed February 27, 1911.

Appeal from District Court, Cavalier county; *Kneeshaw, J.*

Action by E. A. Wadsworth against C. R. Owens. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

*Ball, Watson, Young, & Lawrence* and *W. A. McIntyre*, for appellant.

Tenant holding over after the end of his lease, without a new contract, continues upon the terms of the original lease. 18 Am. & Eng. Enc. Law, p. 405; 24 Cyc. Law & Proc. p. 1011; *Bradley v. Slater*, 50 Neb. 682, 70 N. W. 258; *Jones, Land. & T.* § 205; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; Rev. Codes 1905, § 5531.

Value must be ascertained by a money standard and based on evidence, not conjecture. *Barron v. Northern P. R. Co.* 16 N. D. 279, 113 N. W. 102; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479; *Fralloff v. New York C. & H. R. R. Co.* 10 Blatchf. 16, Fed. Cas. No. 5,025; *Watt v. Nevada C. R. Co.* 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 726.

*Fred E. Smith*, for respondent.

If there is no express agreement reserving title to crops in the landlord, the tenant owns all crops raised on leased land. Rev. Codes 1905, § 5517, 24 Cyc. Law & Proc. p. 1067 (b), and cases cited; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 439; *Forsythe v. Price*, 8 Watts,



282, 34 Am. Dec. 465; Deaver v. Rice, 20 N. C. 567 (4 Dev. & B. L. 431), 34 Am. Dec. 388; Branch v. Morrison, 50 N. C. (5 Jones, L.) 16, 69 Am. Dec. 770; Emery v. Fugina, 68 Wis. 505, 32 N. W. 236; Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 505; Haveron v. Anderson, 3 N. D. 540, 58 N. W. 340.

If landlord acts inconsistently with the theory of original tenancy, he cannot treat the tenant as holding over. 24 Cyc. Law & Proc. pp. 1013 (b), 1014 (b), and cases cited.

SPALDING, J. This action was brought to recover possession of certain grain raised on the premises described in the complaint, in Cavalier county, during the season of 1906, or for its value in case a return thereof could not be had. Plaintiff claimed ownership thereof in his complaint, and alleged the value to be \$2,500. The plaintiff took possession of the grain, and the answer was a general denial, except that it admitted the value of the grain as alleged in the complaint, and alleged its taking by the plaintiff, and demanded a return thereof or its value. The action was tried, and a verdict was rendered for the defendant, finding the value of his interest therein to be the sum of \$700. The plaintiff appeals, and in his brief, discusses errors assigned in failing to direct a verdict in favor of the plaintiff, the exclusion of certain rebuttal testimony offered by plaintiff upon a material issue, and the refusal of the trial court to give certain instructions.

The subject of this controversy was before this court and considered in Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667. On the former appeal the judgment of the district court in favor of the defendant was reversed, and a new trial ordered, for error in excluding certain rebuttal testimony. Rebuttal testimony of the same character was excluded on this trial. We might rest our decision upon the error in so excluding it, but inasmuch as the case has been tried twice, and twice appealed, we deem it advisable to consider some of the principles involved, for the guidance of the parties and the court.

It appears that the plaintiff was the owner of the lands described, and that he and the defendant entered into written contracts, whereby the defendant agreed to, and did, crop such lands during the season of 1905. He remained on the premises by the consent, and perhaps by the request, of the plaintiff during the winter of 1905 and 1906,

. 21 N. D.—17.

during which time they had some talk with reference to cropping the land during the season of 1906. The plaintiff at one time expected to sell it, and in that case wished the defendant to crop another tract of his land. He did not make a sale, and some talk was had with reference to the execution of a new contract, but none was executed. Defendant remained on the premises. Plaintiff furnished the seed, or directed defendant to procure it at his expense, which he did, and sowed the same. After the seed was in the ground the defendant refused to sign the new contract, which contained the customary provision, reading as follows: "Defendant agrees not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, or the stock, increase, income, or produce herein mentioned, of any kind, character, or description, until the division thereof, without the written consent of the party of the second part, and until all of the covenants and agreements to be performed by the party of the first part shall have been fulfilled, and such division made. The title and possession of all hay, grain, crops, produce, stock, increase, income, and products raised, grown, or produced on said premises, shall be in the party of the second part; and said party of the second part has the right to take and hold enough of the crops, stock, increase, income, and produce that would on the division of the same belong to said party of the first part, to repay any and all advances made to him by the party of the second part." The contract for 1905 contained like provisions.

It seems to appear by the evidence that an agreement was arrived at as to some trifling changes in the contract, but only relating to matters of no material importance in the consideration of this appeal. During the threshing of the crop raised by the defendant, plaintiff learned that he was disposing of some of it without any division having been made, and interviewed him on the subject, when he was ordered from the premises and otherwise given to understand that he had no right or interest in the crop; whereupon this action was commenced.

Counsel for both parties, and the trial court, treated the contracts as leases, and we shall do the same. However, if it were important to distinguish, they might be held to be cropping contracts.

While the questions involved in this case are quite simple, yet the procedure on the trial was such that it renders them somewhat involved. Plaintiff was, in the main, proceeding on the theory that he owned the

crop until a division, by reason of having made a verbal contract for rental during the season of 1906. The defendant denied having made any such contract, or any contract for that year, and this was in a large measure the issue before the court. The plaintiff did, however, request instructions which warrant us in considering the phase now urged, that there was a renewal in law of the 1905 contracts.

Section 5531, Rev. Codes 1905, reads: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year." If the verdict in this case is of any weight it establishes the fact that there was no new agreement covering the year 1906. It therefore follows that the plaintiff cropped the premises during that year with no agreement, express or implied, or that the terms of § 5531 apply. Respondent contends that they are not applicable, because the contracts for 1905 expired before the cropping of the season 1906, and his occupancy during the winter of 1905-06 was by reason of plaintiff's request to him to remain there. We are unable to discover, either on reason or authority, that the occupancy of the buildings and premises during the winter of 1905 and 1906 changes the rule. It was continuous occupation, and it matters not whether he remained at the request of the plaintiff, or of his own volition without express permission to do so. The law, in the absence of a new contract and in the event of the tenant continuing his possession and cultivation, presumes the renewal or continuance of the former contract, in the absence of evidence overcoming that presumption. In the case at bar no evidence was introduced to show this, except after the defendant had accepted from the plaintiff the seed for 1906, and had sown it. It was then too late to assert, in the absence of new contracts, that he was not bound by the terms of the 1905 contracts. This question was passed upon in *Merchants' State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853, but it is contended that this case does not come under the provisions of the statute above cited, because the landlord had accepted no rent. Under the circumstances of this case, this is immaterial. The acceptance of rent only operates as evidence that the landlord consents to the renewal or extension of the contract, and where the evidence is adequate to establish the fact without his having received rent, the receipt or failure

to receive rent is not material. The landlord may elect, when a tenant continues in possession after the expiration of his lease, to treat him as a trespasser or as continuing the lease of the former year. *Den. ex dem. Decker v. Adams*, 12 N. J. L. 99; *Rowan v. Lytle*, 11 Wend. 619; *Stoppelkamp v. Mangeot*, 42 Cal. 316; *Bollenbacker v. Fritts*, 98 Ind. 50; 24 Cyc. Law & Proc. p. 1017; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94. It is clear in this case that the landlord did not elect to treat the tenant as a trespasser, but recognized his tenancy in many ways.

The defendant being bound by the terms of the 1905 contracts, the rights of the parties are the same as in *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547. That was an appeal from a judgment for defendant in an action similar in nearly every respect to the present one. The court said, in the opinion in that case, that "if the contract constitutes a lease, or, in other words, a transfer of an interest in the land for a specific period, it follows that the title to all crops is in the lessee; for a grant carries with it, as an incident, the right to the full enjoyment of the thing granted. One who buys the right to use real property for a certain term secures all the rights of the owner to make profit out of it by its reasonable use. If, on the other hand, the agreement does not vest any interest in the land in the one who is to farm it, but he is a mere servant of the owner, the title to all crops is, in the absence of an agreement to the contrary, in the owner. The other party to the contract, not being invested with any interest in the real property, cannot, without express agreement to that effect, have any interest in the produce thereof. But whether the contract is a lease, or constitutes a mere hiring of the person who works the land, it is lawful for the parties to agree touching the title to those things which issue from the land." The agreement regarding title in that case, being retained in the owner of the land, was the same as in the case at bar, and the court held that the plaintiff should have had a verdict, and that it was the trial court's duty to direct a verdict for the plaintiff. On the former appeal in this case we referred to the *Angell Case* with reference to the power of the court to adjust, upon equitable principles, the rights of the parties in a replevin suit. The size and character of the verdict in the case at bar indicates that the court or the jury attempted to do so herein. It would seem that they found the value of the interest of the appellant in the

crop in question to be \$1800, and then gave the defendant a verdict for his interest in the crop. We are unable to determine how the jury arrived at these figures, in view of the court having excluded evidence to show advancements made by appellant to the respondent. In any event the jury cannot adjust the rights or equities of the parties in an action of this nature, where the plaintiff has an interest in or lien upon the chattels replevied, by returning a net verdict in favor of the defendant, and thereby shift the costs to the party who is in the right. That is what the verdict and judgment in this case does, even if we construe it in the light of the contention of the respondent.

In view of our conclusions, it is manifest that a new trial would be without benefit to either party.

The judgment of the District Court is reversed, and that court is directed to enter judgment adjudging the right of possession to the crop involved to be in the appellant. Of course this does not mean that the respondent has no interest in it, but whatever his interest may be is subject to adjustment and determination in an appropriate action, or by other methods. All concur.

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LEONARD STOCKWELL v. W. C. CRAWFORD, District Judge of  
the Tenth Judicial District of North Dakota.

(130 N. W. 225.)

**Mandamus — Official Discretion.**

1. Generally mandamus does not lie to control the exercise of judicial discretion.

**Courts — Adjournment — Discretion of Presiding Judge.**

2. Under the facts disclosed by the record in this case, the action of the defendant as judge of the district court of Billings county, set forth in the opinion, in adjourning a term of the district court of that county without trying the case in which the plaintiff herein was a party, was an exercise of judicial discretion.

**Judges — Affidavit of Prejudice — Form of Filing.**

3. Affidavits of prejudice directed at the judge of the district court, and not filed before the commencement of the term at which the case is to be tried, are of no effect, and do not deprive the judge of the right or power to try the action in which such affidavits are filed during term time.

**Mandamus — Reconvening Court — Calling in Another Judge.**

4. Under the circumstances and proceedings surrounding the act of the judge in this case, it is *held*, that his attempts to secure the judges of other districts to sit in the trial of the case in his place were purely voluntary; and that mandamus will not lie to compel him to reconvene the term of court and call in another judge by reason of his not having made every effort possible to secure another judge to sit in the trial of the cause in which the plaintiff was a party.

**Courts — Terms — Adjournment — Discretion of Judge.**

5. The discretion of a judge of the district court pertaining to the setting of causes for trial, the order of their arrangement on the calendar, and the adjournment of terms of his court, is almost unlimited, and oftentimes the rights of a litigant must give way to the superior rights of the public and the necessities of the occasion as governed by the duties of the judge and the terms and business of the several counties of his district.

Opinion filed February 29, 1911.

Mandamus by Leonard Stockwell against W. C. Crawford, District Judge of the Tenth Judicial District.

Writ quashed.

*M. A. Hildreth*, for petitioner.

*W. F. Burnett* and *T. F. Murtha*, for respondent.

SPALDING, J. The plaintiff herein applied to this court for an alternative writ of mandamus directing the Honorable W. C. Crawford, judge of the tenth judicial district, to immediately reconvene the district court for the county of Billings and proceed to the trial of the cause of Stockwell v. Haigh, by jury, without delay, and to fix some reasonable time and proceed to the trial of said cause; or to show cause for not obeying the command of the writ. The judge of that district made due return to the writ, and it rests upon us to determine whether the action of Judge Crawford in adjourning, *sine die*, the regular January term of the district court of Billings county on the 23d day of January, 1911, furnishes ground for the relief demanded by plaintiff.

It appears from the showing made by the plaintiff that the district court in Billings county convened on the 10th day of January, last, and upon the call of the calendar the plaintiff, by his counsel, gave notice that he was ready to try and dispose of the case above referred to; that in arranging the calendar of causes for trial upon a call thereof,

plaintiff's case was set as the tenth case for trial, and that he, with his witnesses and counsel, remained in attendance upon the court awaiting the disposition of cases having precedence over his, until the 23d of January, at considerable expense; that after the criminal business was disposed of, the civil calendar was taken up on the 16th or 17th of January, and, on the 21st of that month, applicant's case was called for trial. Thereupon the defendant responded that he was unable to have his attorneys, Messrs. Ball, Watson, Young, & Lawrence present, by reason of the fact that Mr. Lawrence had been called out of the state on account of the serious illness of his mother. The court gave the defendant, Haigh, to understand that he must make arrangements for different counsel, and that said cause would have to be tried in its regular order; thereupon said Haigh presented to the clerk, and offered for filing, his affidavit of prejudice against the judge, uncorroborated by any affidavit of counsel. Counsel for the plaintiff objected to the sufficiency of the affidavit, and the court indicated that it was insufficient and imperfect. Counsel also made the point that the application for a change of judges came too late, because not filed on or before the first day of the term, as required by the statute. The 21st day of January was Saturday. The matter was held open until Monday, the 23d. Upon the latter day, and after the disposition of the business, the case was called for trial, and thereupon, W. F. Burnett, Esq., of Dickinson, presented the affidavit offered on the 21st of January, with the required corroborating affidavit, when counsel for the plaintiff insisted that the cause should proceed at once to trial.

The court, after consideration, stated that he felt great delicacy in trying the cause (the reasons given need not be stated here), and that he would grant the application for a change of judges. Thereupon he endeavored to secure the attendance of the judge of the sixth judicial district, and, failing in that, the judge of the third judicial district, but was unable to secure his attendance, and made no further effort.

These proceedings occurred after noon; and at about 5 o'clock on the 23d day of January, over the objection of counsel, the judge refused to hold the term of court open until he could communicate and arrange with some other judge, but adjourned the term *sine die*.

Section 7045, Rev. Codes 1905, states the conditions upon which the judge of one district shall call in the judge of another district, by rea-

son of prejudice, and it requires the affidavits of prejudice to be filed after issue joined and before the opening of the term at which the cause is to be tried. It is conceded by plaintiff that the affidavits in this case were ineffective by reason of their not having been filed on or prior to the opening of the term of court.

Great stress is laid upon the circumstances surrounding the case, as indicating the bad faith of the defendant in filing the affidavits of prejudice; and it does appear very strongly that, finding himself at a disadvantage by reason of his attorney being called away, he had resorted to this method to secure a continuance of the case. But we are dealing with the legal phase of the matter, and must consider the return of Judge Crawford, as the motive of the defendant is of less importance than the reasons given by the judge.

Judges Winchester and Pollock were the only judges residing on a direct line of railroad from Medora, the county seat of Billings county; and it appears from the return, that Judge Crawford knew that Judge Coffey, of the fifth judicial district, was engaged in a term of court, and that Judge Crawford had cases set for trial at Dickinson, in Stark county, on the 25th and 26th days of January; that the tenth judicial district is composed of ten counties, and that he is required to hold about twenty terms of court in each year therein; that prior to the time mentioned a term had been called for Mott, in Hettinger county, for the 30th day of January, and another in Morton county, for the 7th day of February; that the Hettinger county term would continue one week, and the Morton county term probably two or three weeks, and that an outside judge could not be procured without exchanging places with him, and that by reason of the imminency of such terms of court and the trial of causes previously set at Dickinson, it would have been impossible for him to exchange places with any other judge. He also sets out, what this court takes judicial notice of, that Medora is a small village near the western border of the state, and that any judge, other than those before named, would have to travel a great distance to reach there; and it is also clear that, if any such judge had been able to arrange his pending business so as to have left his home on the 24th, he could not have reached Medora before the 25th or 26th of January.

It is shown that the case in question was on the calendar for the first time; that three other cases involving the same facts and requiring



the attendance of the same witnesses were also on the calendar, one of which had been continued till the next term of court.

This is a greatly abridged statement of the conditions and facts, but it is sufficient for the purpose.

Great emphasis is placed upon the right of the plaintiff to have a speedy trial, and on other provisions of the Constitution, but it appears to us that the question is one of the proper or improper exercise of the discretion of the court.

For the reasons stated, the judge was under no legal obligation to call in another judge. This, we think, leaves the question, so far as we are called upon to deal with it, in the same position as though no affidavits of prejudice had been filed. By adjourning the term *sine die*, at 5 o'clock on the 23d, when the judge had cases previously set for trial at Dickinson on the 25th, was the plaintiff deprived of a legal right for which we can, under the circumstances, furnish a remedy? The Declaration of Rights, found in the Constitution, provides that "all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due process of law, and right and justice administered without sale, denial, or delay." But the question of delay is a relative question. What does or what does not constitute delay depends largely on the surrounding circumstances, the work imposed upon the judge, and other conditions. The judge of a district comprised of ten counties, in which he is required to hold at least twenty terms of court per year, must necessarily be permitted to exercise a very large degree of discretion in the arrangement of the cases of his district, and in determining when he must adjourn a term of court, and when he should hear causes in the different counties. Aside from the jury terms, the court is open at all times for the trial or hearing of other causes and motions, and if this court should arbitrarily say that all the other business of a large judicial district must be suspended at a given instant to permit the judge to try any particular cause, we should be supervising his acts with reference to matters of which we are often incapable of judging.

The affidavits of prejudice, being invalid, renders the attempt of Judge Crawford to secure another judge a purely voluntary act, and, being so, he could extend his efforts to all the district judges of the state, or make the request of only such as, in his opinion, might be

able to attend and sit in his place without undue inconvenience or expense. The law relating to judges serving in districts other than their own is very inadequate to meet the situation. Every time a judge goes out of his district to accommodate another judge, or to preside where the local judge is disqualified, he must pay his own expenses going and coming, and during his attendance, and it in fact works a penalty upon the judge who is called upon to do so. Aside from the judges named, no judge could have been reached in this state who would not have had to travel from 400 to 800 miles. Undoubtedly these matters were all considered. In fact, the return of Judge Crawford so indicates. Did, then, his adjournment of the term on the evening of the 23d, when he had previously set cases for trial in Dickinson for the 25th, constitute an abuse of discretion? Dickinson is 40 miles east of Medora. Only two trains each way per day stop at Medora, and it is quite possible that it would have taken Judge Crawford a considerable portion of the 24th to reach Dickinson; but if there were a large number of witnesses present, as is indicated by the plaintiff, it is not at all probable that the case could have been completed on the 24th, and several days might have been consumed in the trial, in which case it would certainly have interfered with the previous arrangements of the judge for the hearing of other causes.

We know of no matter on which there is so wide an opportunity for the exercise of discretion pertaining to litigation as in the setting and arrangement of causes for trial by the district court, and in view of the immeasurably superior opportunities for intelligent judgment in such matters possessed by the district judge, it must in effect be left practically to his sense of the needs, relations, and necessities of the parties and the public. It must be a most clear and extraordinary violation of his duties to warrant this court in holding that he should reconvene a term which he has once adjourned, when he has business in other counties of his district requiring immediate attention.

We regret that the situation works a hardship to litigants, as it often does, and as it appears to have done in this instance; but their rights must oftentimes give way to the superior rights of the public and the necessities of the occasion. The affidavits of prejudice being of no force, and the action of the judge in calling on the other judges having been purely voluntary, the matter rests on the exercise of the discretion of

the district judge. *Mandamus* does not generally lie to control the exercise of judicial discretion. 26 Cyc. Law & Proc. p. 188. Had he simply declined to act on an erroneous claim that he was disqualified, the writ might lie, but the return shows the grounds set forth above.

The writ is quashed.

All concur, except MORGAN, Ch. J., not participating.

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### S. M. JENSON v. JOE FRAZER.

(130 N. W. 832.)

#### County Courts — Appeal — Amendment of Statute — Effect on Perfected Appeals.

1. In February, 1907, plaintiff duly perfected an appeal to the district court from a judgment of the county court. At that time the party appealing had an election to appeal either to the supreme or district court. In March following, chapter 68 of the Session Laws of 1907 took effect, and by its provisions such appeals are restricted to the supreme court.

*Held*, that such amendatory statute does not operate to oust the district court of jurisdiction acquired by it over appeals previously taken and perfected.

#### County Courts — Appeals.

2. Under the statute in force at the time such appeal was perfected, appeals from the county to the district court were authorized to be taken in the same manner as appeals from justices' courts. It is accordingly held, that plaintiff had a right to appeal to the district court for trial *de novo* or on questions of law alone.

Opinion filed March 9, 1911.

Appeal from District Court, Ward county; *Charles F. Templeton, J.* Action by S. M. Jenson against Joe Frazer. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

*Palda & Burke*, for appellant.

Appeals are governed by the statute in force when they are perfected. *Rivers v. Cole*, 38 Iowa, 677; *Simberskey v. Smith*, 27 Iowa, 177; *Smith v. Van Gilder*, 26 Ark. 527; *Cheek v. Berry*, 27 Ark. 314; *Don-*

aldson v. Security Trust & S. V. Co. 20 Ky. L. Rep. 857, 47 S. W. 763; Terry v. Johnson, 105 Ky. 760, 49 S. W. 767; and Donaldson v. Security Trust & S. V. Co. 21 Ky. L. Rep. 1796, 56 S. W. 424; Alexander v. Warner, 22 Ky. L. Rep. 720, 58 S. W. 700; Chalker v. Ives, 55 Pa. 81; Kepler v. Rinehart, 162 Ind. 504, 70 N. E. 806, and cases therein cited; Twenty Per Cent Cases, 20 Wall. 187, 22 L. ed. 341; Potter's Dwar. Stat. 161; Wood v. Oakley, 11 Paige, 403; McEwen v. Den, 24 How. 242, 16 L. ed. 672; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Ropes v. Snyder Harris Bassett Co. 35 Fla. 537, 17 So. 651.

All statutes operate prospectively, unless their terms, express or implied, import the contrary. Harvey v. Tyler, 2 Wall. 347, 17 L. ed. 875; United States v. Heth, 3 Cranch, 399, 2 L. ed. 479; State ex rel. McClory v. Donovan, 10 N. D. 610, 88 N. W. 717; American Invest. Co. v. Thayer, 7 S. D. 72, 63 N. W. 233; Krom v. Levy, 60 N. Y. 126; Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48.

*Dorr H. Carroll*, for respondent.

The legislature having taken away the right of appeal to the district court, the latter is left without jurisdiction. Re Weber, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523; Travelers' Ins. Co. v. Weber, 2 N. D. 239, 50 N. W. 703; Harvey v. Fink, 111 Ind. 249, 12 N. E. 396; Barker v. Thompson, 98 Ill. App. 78.

Except when granted by a Constitution, right of appeal is not a vested right. 2 Enc. Pl. & Pr. pp. 19, 20, note 2; Ex parte McCordle, 7 Wall. 506, 19 L. ed. 264; Callahan v. Jennings, 16 Colo. 471, 27 Pac. 1055; Smith v. District Ct. 4 Colo. 235; Harrison v. Smith, 2 Colo. 625; 1 Am. & Eng. Enc. Law, p. 623; Willoughby v. George, 4 Colo. 22; Stebbins v. Anthony, 5 Colo. 273; Webster v. Gaff, 6 Colo. 475.

FISK, J. This is an appeal from a judgment of the district court of Ward county dismissing an appeal taken by plaintiff from a judgment entered in the county court of said county in defendant's favor.

The assignments of error present, for our consideration, the sole question as to the correctness of the order dismissing such appeal.

The facts necessary to an understanding of the question involved are, briefly stated, as follows: This action was duly commenced in said county court in June, 1906, and a trial of the issues in January, 1907,

resulted in a verdict and judgment in defendant's favor. On February 16, 1907, plaintiff duly perfected an appeal from such judgment to the district court. Thereafter, and on April 13, 1907, defendant caused notice to be given to plaintiff that he would, on April 22d, apply for an order dismissing such appeal. The grounds of such motion are not stated in the record, but the abstract discloses that on May 20th of said year an order was entered reciting the fact of defendant's objection to the jurisdiction of the court, and directing the dismissal of such appeal. Pursuant to such order, judgment was ordered dismissing the appeal, with costs, from which judgment this appeal is prosecuted.

Neither the printed abstract, nor the original record, contains the motion papers nor discloses the grounds of the motion; but we assume from the briefs presented that the grounds of the motion, and the order and judgment complained of were that the act of 1907, being chapter 68 of the Session Laws of that year, which act amends § 8292, Rev. Codes 1905, so as to limit appeals from judgment of the county court to the supreme court only, necessarily operated to oust the district court of jurisdiction over such appeal. Such act became operative on March 19, 1907. The sole question for our consideration, therefore, is, What effect did the act aforesaid have upon the jurisdiction of the district court to entertain such previously perfected appeal? Under the statute, § 8292, Rev. Codes 1905, in force at the time such appeal was taken and perfected, plaintiff had the right to appeal either to the district or supreme court. But, as before stated, the act of 1907 amends said section by providing for appealing only to the supreme court. It is apparent, therefore, that such amendment operated to impliedly repeal the former statute in so far as it permitted appeals from the county court to the district court, and in view of the fact that such amendatory statute, by its terms, makes no exception in favor of pending appeals to the district court, authorities apparently supporting the trial court's ruling are not wanting. 4 Enc. L. & P. 623, and cases cited; 2 Enc. Pl. & Pr. pp. 19, 20 and cases cited.

Were it not for the statutory provision hereinafter mentioned, we might be inclined to adopt the views of the trial court. But by § 6732, Rev. Codes 1905, it is expressly provided that "no part of it (Code of Civ. Proc.) is retroactive unless expressly so declared." That this statutory rule applies to future amendments to the Code is well settled.

Such is the express holding of the supreme court of California under an identical statutory provision. *Ukiah Bank v. Moore*, 106 Cal. 673, 39 Pac. 1071.

Chapter 68 of the Laws of 1907, aforesaid, contains no express declaration that it shall be retroactive in its operation. On the contrary it merely purports to govern future appeals. It reads: "In all actions brought under the provisions of this chapter, an appeal may be taken to the supreme court of the state in the same manner and pursuant to the same rules as appeals from the district court; . . ."

To give to such statute the effect contended for by respondent's counsel might, and no doubt would in many cases, work great injury to litigants. We cannot believe that it was the legislative intent in the enactment of such statute to oust the district courts of jurisdiction in causes then pending therein on appeals previously perfected from county court. To give the force to said statute contended for would, in effect, be giving to it a retroactive operation. While such implied repeal of the former statute, no doubt, took effect and became operative on the date of its approval, it should be given a prospective operation merely. Appeals thereafter taken from county courts must, of course, be governed by the provisions of the new statute, but where, under the former statute, district courts have, through duly perfected appeals, acquired jurisdiction, not only of the parties but of the subject-matter, they should not be deemed to have lost such jurisdiction by the amendment in question. Authorities to the contrary in jurisdictions not having a statute similar to § 6732, aforesaid, are of little, if any, value as precedents here. As tending to support our views, see 36 Cyc. Law & Proc. pp. 1219, 1220, and cases cited; also *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48.

Respondent's contention, that the appeal was properly dismissed for the reason that such appeal was for trial *de novo* in the district court, and not merely for the review therein of alleged errors of law, and that the legislature never contemplated that such an appeal might be had, is, we think, without merit. The statute expressly authorized appeals to be taken in the same manner as appeals from justice's court. § 8292. Appeals from justice's courts may be either on questions of law alone or for trial anew.

For the foregoing reasons the judgment is reversed and the cause remanded for further proceedings according to law.

All concur, except MORGAN, Ch., J., not participating.

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WALTER DICKINSON v. W. J. CARROLL.

(— L.R.A.(N.S.) —, 130 N. W. 829.)

**Negotiable Instruments — Gift of Note — Bond Purchaser.**

Plaintiff voluntarily, and with full knowledge that he owed nothing to defendant, executed and delivered to him his negotiable promissory note, which the latter sold and transferred to a bona fide purchaser for value and without notice of any defense. Plaintiff, being compelled to pay such note, brought this action to recover from defendant the amount thus paid.

*Held*, that no cause of action exists.

Opinion filed March 9, 1911.

Appeal from District Court, Ward county; *E. B. Goss, J.*

Action by Walter Dickinson against W. J. Carroll. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

*Palda, Aaker, Green, & Kelso*, for appellant.

A voluntary payment, with free knowledge of all the facts, cannot be recovered, and payments are voluntary except where the payer was in immediate danger of injury to property or person, even though payment is made under protest. *Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, 80 Pac. 899; *Wessell v. D. S. B. Johnson Land & Mortg. Co.* 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Powell v. St. Croix County*, 46 Wis. 210, 50 N. W. 1013; *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. 847; *Cummings Harvester Co. v. Sigerson*, 63 Kan. 340, 65 Pac. 639; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *Union P. R. Co. v. Dodge County*, 98 U. S. 541, 25 L. ed. 196; *Selby v. United States*, 47 Fed. 800; *Gould v. McFall*, 118 Pa. 455, 4 Am. St. Rep. 606, 12 Atl. 336; *Pepperday v.*

Citizens' Nat. Bank, 183 Pa. 519, 39 L.R.A. 529, 63 Am. St. Rep. 769, 38 Atl. 1030; New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co. 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51; United States v. Edmonston, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718; Laidlaw v. Detroit, 110 Mich. 1, 67 N. W. 967; Francis v. Hurd, 113 Mich. 250, 71 N. W. 582; Lathrope v. McBride, 31 Neb. 289, 47 N. W. 922; Flack v. National Bank, 8 Utah, 193, 17 L.R.A. 583, 30 Pac. 746; Mayer v. Hoffman, 67 Wis. 279, 30 N. W. 355; Redmond v. New York, 125 N. Y. 632, 26 N. E. 727.

Acceptance of renewal note in place of an old one pays the latter. Citizens' Commercial & Sav. Bank v. Platt, 135 Mich. 267, 97 N. W. 694; Stanley v. McElrath, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16; Ellis v. Ballou, 129 Mich. 303, 88 N. W. 898.

*Blaisdell, Bird, & Blaisdell*, for respondent.

A consideration is a benefit to the promisor or a detriment to the promisee. 9 Cyc. Law & Proc. pp. 308, 316, 336.

Settlement knowingly of an unfounded claim is no consideration for repayment. McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Rudolph v. Hewitt, 11 S. D. 646, 80 N. W. 133; Taylor v. Weeks, 129 Mich. 233, 88 N. W. 466.

For conversion of bills and notes, measure of damages is, *prima facie*, the face of the note. 26 Am. & Eng. Enc. Law, p. 845, also see note 1 on same page; Metropolitan Elev. R. Co. v. Kneeland, 120 N. Y. 134, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381.

Where one is compelled to pay money by another's act, for which he would not be liable but for such act, he can recover. *Edmunds v. Deppen*, 97 Ky. 661, 31 S. W. 468; 27 Cyc. Law & Proc. p. 840 (subd. A under III. Defenses) and cases cited in note; 27 Cyc. Law & Proc. p. 836 (under heading D), and cases cited in note.

From an order overruling a demurrer to the complaint, defendant appeals. The complaint is as follows:

"(1) That on or about the 4th day of April, 1906, for value received, this plaintiff executed and delivered to the Blaisdell-Bird Company, a corporation, his certain promissory notes payable to the Blaisdell-Bird Company or order, one for \$100 due November 1, 1907, and one for \$180 due November 1, 1908, said notes bearing interest at the rate of 10 per cent per annum. That at said time and place he also



executed and delivered to Grace Cochran his two certain promissory notes, payable to Grace Cochran or order, one for \$200 due November 1, 1906, and one for \$100 due November 1, 1907, said notes bearing interest at the rate of 10 per cent per annum.

“(2) That on or about November 26, 1906, this plaintiff paid one John W. Cochran \$200, same to apply on his indebtedness to the said Grace Cochran, and the said John W. Cochran, having possession of the said note in favor of the said Grace Cochran for \$200, returned the same to this plaintiff; and that thereupon the total indebtedness of this plaintiff to the said Grace Cochran was \$100, and his total indebtedness to said the Blaisdell-Bird Company, \$280. That thereupon this plaintiff executed and delivered to the said John W. Cochran his certain promissory note, dated November 26, 1906, due November 1, 1907, payable to the said John W. Cochran or order for \$380, and interest at the rate of 10 per cent per annum, said note representing this plaintiff's total indebtedness to said Grace Cochran and said the Blaisdell-Bird Company, and said John W. Cochran, thereupon having possession of the said notes in favor of said the Blaisdell-Bird Company, but which had not been transferred by said the Blaisdell-Bird Company, returned same to this plaintiff. That this plaintiff at said time believed that the said John W. Cochran had authority to return said notes in favor of the Blaisdell-Bird Company and take in settlement thereof the note payable to himself hereinbefore mentioned. That said John W. Cochran, in fact, had no authority to do such act, and the same was done without the knowledge or consent of the Blaisdell-Bird Company.

“(3) That subsequently the said John W. Cochran transferred the said note for \$380 to the said Grace Cochran, receiving no consideration therefor except that she owned an interest in said note to the extent of \$100. That the said Grace Cochran, being indebted to one T. E. Fox, as security transferred the said note for \$380 to said T. E. Fox. That some time about the fall of 1907, this plaintiff learned, and was informed by the Blaisdell-Bird Company, that the said John W. Cochran had no authority to deliver the said notes in its favor and take in settlement thereof the note payable to himself, and that the Blaisdell-Bird Company was the owner of an interest in said note to the extent of \$280 and interest, or the indebtedness thereby repre-

sented, and that the said notes in favor of the Blaisdell-Bird Company executed by this plaintiff on April 4, 1906, were still unpaid and a good claim against this plaintiff.

“(4) That on or about February 6, 1908, this plaintiff paid to the said T. E. Fox the sum of \$146, which was the total indebtedness of the said Grace Cochrane to the said T. E. Fox, and also was the total amount of the interest in said note for \$380 owned by the said Grace Cochrane, and the entire balance of indebtedness from this plaintiff to said Grace Cochrane, including interest on the two original notes from date to payment. Thereupon the said T. E. Fox returned to the said Grace Cochrane the said note for \$380. That subsequently the said Grace Cochrane returned said note for \$380 to the said John W. Cochrane, her entire interest in the same having been paid, and that the balance of said note for \$380 was entirely without consideration. That \$280 thereof, or the indebtedness represented thereby, was the property of the Blaisdell-Bird Company, and the Blaisdell-Bird Company had the sole right to release the same.

“(5) That some time in the spring or middle part of the year 1908 the said John W. Cochrane transferred the said note for \$380 to this defendant, said transfer taking place long after the maturity of said note and long after this plaintiff had been apprised of the facts hereinbefore set forth. That about the latter part of July or the first part of August, 1908, this defendant was informed of the facts hereinbefore set forth, and had full knowledge that he was not the owner of said note for \$380 or the indebtedness represented thereby. That he could not release the same, and that he could not legally enforce a collection thereof. That with full knowledge of said facts, and without the right or authority to release the balance of said note for \$380 or the indebtedness represented thereby, he went to this plaintiff and returned to him said note for \$380, taking in settlement thereof this plaintiff's promissory note, dated August 6, 1908, payable to this defendant or order, for \$290.08 due October 1, 1908, bearing interest at rate of 12 per cent per annum. That the said note in favor of this defendant was entirely without consideration. That this defendant was not the owner thereof or the indebtedness thereby represented, and had no right to transfer same.

“(6) That subsequently this plaintiff was compelled to and did

settle with the Blaisdell-Bird Company in full his indebtedness to it, paying in full the notes in favor of the Blaisdell-Bird Company, described in paragraph 1 hereof.

“(7) That, before the maturity of said note in favor of this defendant, this defendant in the usual course of business indorsed and transferred the said note for value to the Second National Bank at Minot, a corporation, the said Second National Bank purchased the said note for value before maturity, and without any knowledge of the facts hereinbefore set forth, or any knowledge that the said note was without consideration or in any way void or defective, or any knowledge that said defendant was not the owner of said note or the indebtedness thereby represented, or any knowledge that he had no right to transfer same. That by reason of the facts hereinbefore set forth, and that the said Second National Bank was a bona fide purchaser before maturity, in the usual course of business, for value, of the said note in favor of this defendant, this plaintiff was compelled to pay said note to said Second National Bank of Minot, and on or about the 29th day of October, 1908, did pay said note, amounting with interest to \$297.80, to the said Second National Bank, paying in cash \$7.80, and the balance in his note for \$290 due October 1, 1909, with interest at 12 per cent per annum, payable to the said bank or order.

“(8) That by reason of the facts hereinbefore set forth this plaintiff has been damaged in the sum of \$297.80, with interest thereon at the rate of 12 per cent per annum from October 29, 1909.

“Wherefore this plaintiff demands judgment against this defendant for the sum of \$297.80, with interest thereon at the rate of 12 per cent per annum from and since October 29, 1908, besides his costs and disbursements herein.”

The sole ground of the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action. Order reversed.

FISK, J. The allegations of the complaint, admitted by the demurrer, may be epitomized as follows: Plaintiff voluntarily, and with full knowledge of the facts, executed and delivered to defendant his negotiable promissory note, without consideration; and the latter, with such knowledge, accepted the same. Thereafter and before its maturity defendant transferred the same in due course and for value to an in-

nocent purchaser, to whom plaintiff was obliged to and did pay the sum due thereon. Do such facts create any liability on defendant's part, under any theory of law, to reimburse plaintiff for the money which he was thus required to pay? The question thus presented is somewhat novel. Neither party has cited any authority directly in point, and we have been unable to find that the identical question has ever been before the courts for decision. As we view the matter it is not a question involving a voluntary payment, as appellant's counsel seem to think, although somewhat analogous thereto. While the note was voluntarily given, it paid nothing, as there was concededly nothing to pay. It merely amounted to a voluntary promise on plaintiff's part to pay to defendant or order, a sum of money at a future date. Such note was not voluntarily paid by plaintiff. He was compelled to pay it to such bona fide purchaser because of a legal duty so to do, arising from the negotiable instrument law. On principle, we can discover no sound reason why defendant is under any obligation to plaintiff to reimburse him for the sum thus paid on such note. If, instead of voluntarily giving to defendant such negotiable note, plaintiff had given to defendant the face value thereof in cash, under the like circumstances, none would contend that defendant would owe any legal duty to repay such sum to plaintiff. The act of defendant in transferring such note cannot be deemed an actionable wrong, as by the giving of the note negotiable in form it must be held that plaintiff contemplated that the same might be negotiated, and thereby consented thereto. As was said by the court of appeals of New York: "The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense, which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given as the words of negotiability show. It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancelation. *Jackman v. Mitchell*, 13 Ves. Jr. 581, 9 Revised Rep. 229, 12 Eng. Rul. Cas. 321. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him." *Solinger v. Earle*, 82 N. Y. 393.

If, prior to the negotiation of such note by defendant, plaintiff had

elected to repudiate any liability thereunder and had communicated his election so to do to the defendant, demanding a return and cancellation thereof, a different question would arise. Under such a state of facts it might properly be said that the defendant's negotiation of the note would constitute an actionable wrong, entitling plaintiff to recover. But under the facts alleged in the complaint and admitted by the demurrer in the case at bar, we fail to see how defendant owes to plaintiff either a legal or moral duty in the premises. Neither in good morals nor in good conscience is defendant called upon to reimburse plaintiff for the loss suffered by him solely as a result of his own folly.

On the argument in this court respondent's counsel requested that permission to amend the complaint be given in the event a decision is reached adverse to his contention. Such application must, of course, be addressed to the district court after the remittitur has been filed in that court. Permission to make such application is hereby granted.

For the above reasons the order appealed from is reversed and the cause remanded for further proceedings according to law.

All concur, except MORGAN, Ch. J., not participating.

Mr. Justice Goss, being disqualified, did not sit, WINCHESTER, J., of the sixth judicial district, acting in his place by request.

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JOHANNES GRUNOW et al. v. MATHIAS SIMONITSCH and  
W. C. McFADDEN.

(130 N. W. 835.)

**Executors and Administrators — Appointment of Foreign Corporations.**

1. Under the provisions of the Probate Code of this state it is held that a foreign corporation is incompetent to receive letters of administration upon the estate of a deceased person, and that therefore county courts have no authority to issue letters of administration to such foreign corporations.

Opinion filed March 9, 1911.

Note.—Power of foreign corporation to act as administrator, see note in 24 L.R.A.  
291.

Appeal from District Court, Cass county; *Charles A. Pollock, J.*  
Action by Johannes Grunow against Mathias Simonitsch and W.  
C. McFadden. Judgment for defendants, and plaintiff appeals.

Affirmed.

*Heim & Loevinger*, for appellant.

Corporations, if so empowered by their charters, even at common law, can act as administrators. *Minnesota Loan & T. Co. v. Beebe*, 40 Minn. 7, 2 L.R.A. 418, 41 N. W. 232; *Thompson's Estate*, 33 Barb. 334; *Vidal v. Philadelphia*, 2 How. 127, 187, 11 L. ed. 205, 229; *Deringer v. Deringer*, 1 Am. St. Rep. 150, and note, 5 Houst. (Del.) 416; *Schouler, Exrs. & Admsrs.* 2d ed. § 107; *Toller, Exrs. & Admsrs.* 30; *Hill, Trustees*, 48; *Corporations*, 10 Cyc. Law & Proc. p. 1142 (11); 2 Kent, Com. 6th ed. 279; 5 *Thomp. Corp.* § 5837, p. 4520; *Killingsworth v. Portland Trust Co.* 18 Or. 351, 7 L.R.A. 638, 17 Am. St. Rep. 737, 23 Pac. 66; *Lincoln Sav. Bank v. Ewing*, 12 Lea, 602; *Beale, Foreign Corp.* § 233; 1 *Woerner, Am. Law of Administration*, 509.

No express statutory provision precludes foreign corporations acting as administrators and executors, and "legislative silence is equivalent to permission." 5 *Thomp. Corp.* § 5837; *United States Fidelity & G. Co. v. Linehan*, 73 N. H. 41, 58 Atl. 956; *Cowell v. Colorado Springs Co.* 100 U. S. 59, 25 L. ed. 549.

States should not discourage reputable foreign corporations from doing business in this state. *State ex rel. Sheets v. Aetna L. Ins. Co.* 69 Ohio St. 317, 69 N. E. 608; *Coleman v. Parrott*, 11 Ky. L. Rep. 947, 13 S. W. 525; *State ex rel. Clapp v. Fidelity & C. Ins. Co.* 39 Minn. 538, 41 N. W. 108; *Minnesota Loan & T. Co. v. Beebe*, 40 Minn. 7, 2 L.R.A. 418, 41 N. W. 232.

*Stambaugh & Fowler*, for respondents.

**FISK, J.** This is an appeal from a judgment of the district court of Cass county, affirming an order of the county court of that county, denying the petition of appellant, praying for the appointment of the Northwestern Trust Company, a Minnesota corporation duly authorized to transact business in North Dakota, as administrator of the

estate of one Fritz Schumm, deceased, who died intestate in Cass county on May 13, 1909. The facts are not in dispute, and the controlling question for determination is whether such foreign corporation is a competent and qualified person to whom letters of administration may be issued by a county court in this state.

Counsel on both sides confess their inability to find any direct authority in support of their respective contentions. But authorities would be of little assistance, as, manifestly, the decision of such question depends upon the construction to be given to certain provisions contained in the Probate Code of this state. The sections of the Revised Codes relied on by appellant's counsel are the following: Sections 4682, subdivision 4; 8022, subdivisions 1, 8, and 9; 8038, 8039; 6691, 6692; 6707.

Section 4682 is a portion of chapter 22 of the Civil Code, enacted in 1897, relating to the organization and powers of annuity, safe deposit, and trust companies, and by subdivision 4 thereof it provides, in substance, that such domestic corporations may be appointed or commissioned as administrators, executors, etc., the same as natural persons, and that no bond or other security or oath or other qualification shall be necessary to enable such corporations to accept such appointments.

Section 8022, as amended by chapter 116, Session Laws of 1907, designates the persons to whom letters of administration may be issued, as follows:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The creditors.
9. Any person legally competent.
10. The public administrator, or the county wherein there is property of the decedent which remains unadministered, as general or special administrator thereof.

Sections 8038 and 8039 relate to the issuance of ancillary letters of administration in cases of foreign wills allowed to probate in other states and countries. Section 8038 provides, in substance, that executors and administrators appointed under said articles must qualify in the same manner as other executors and administrators; and § 8039 requires that foreign executors and administrators shall, before entering upon their duties, appoint an agent residing in the county where such appointment was made, for the purpose of service of legal papers.

Sections 6691 and 6692 and 6707 are a portion of the Civil Code relating to definitions and general provisions, and are as follows:

Sec. 6691. Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears and except, also, that the words hereinafter explained are to be understood as thus explained.

Sec. 6692. Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except when a contrary intention plainly appears.

Sec. 6707. The word "person," except when used by way of contrast, includes not only human things, but bodies politic or corporate. We are unable to discover any language in the foregoing sections which, in the slightest degree, tends to support the contention made by appellant's counsel. It is perfectly apparent to our minds that, until the enactment of § 4682, the legislature had in the most explicit manner expressed its intention to restrict such appointments to natural persons. By the enactment of § 4682 it is equally apparent that the only change which the legislature intended to make in the existing statute was to permit domestic annuity, safe deposit, and trust companies to receive such appointments. In the light of such plain and manifest legislative declaration, we have no hesitation in adopting the view of the lower court. The rule of comity contended for by appellant cannot be applied in the face of an express legislative will to the contrary. Appellant's contention, in effect, is that under the provisions of the Probate Code as they have existed at all times, a corporation, whether domestic or foreign, was a person competent to act as executor or administrator; and that this is especially true as to foreign corporations which by their charters or the laws of the state of their



creation are thus authorized to act. We are unable to see any merit in such contention. It is clearly apparent that the legislature deemed it necessary to enact § 4682, in order to confer such power on certain domestic corporations. If the power already existed as to all corporations, why this needless legislation?

Our conclusion is that, under existing laws, a foreign corporation is incompetent to receive letters of administration issued by the courts of this state. This renders a consideration of the other questions unnecessary.

The judgment appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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CLARENCE B. MAY v. EDSON C. CUMMINGS, E. A. Perry,  
Thomas Baker, Jr., Will Freeman, and the William H. White  
Lumber Company.

(130 N. W. 826.)

**Mortgages — Merger.**

1. Whether or not a mortgage upon real estate is merged in a deed given by the mortgagor to the mortgagee depends upon the intent and interests of the mortgagee.

**Mortgages — Merger — Evidence.**

2. In this case the evidence shows no agreement to merge titles, and they will be kept separate.

**Mortgages — Possession by Mortgagee — Credit on Mortgage Notes — Evidence.**

3. In the absence of evidence of the value of the occupation of lands, the mortgagor is not entitled to any credit upon his notes. He has the burden of showing such value.

Opinion filed March 10, 1911.

Appeal from District Court, Cass county; *Pollock, J.*

Action by Clarence B. May against Edson C. Cummings and others.  
Judgment for plaintiff, and defendants appeal.

Affirmed.

*Turner & Murphy* and *E. H. Wright*, for appellants.

*M. A. Hildreth*, for respondent.

BURKE, J. In the year 1888, Edson C. Cummings, one of the defendants herein, bought of the plaintiff a farm in Cass county, North Dakota, for the agreed price of \$5,040. He paid no money down, but gave his notes due in instalments of \$500, one each year for ten years, and to secure the same gave a mortgage to May upon the land.

Cummings went upon the land and farmed the same until 1905. Owing to his crops being drowned out, he was unable to reduce his indebtedness upon the land, and by the end of the year 1905 owed May considerable more than the original purchase price. In addition to his indebtedness to May, Cummings owed various other persons and firms, and some of those creditors had reduced their claims to judgments, and the defendant William H. White Lumber Company had filed a mechanics' lien against the land. This lien and the judgments of the other creditors were a lien upon Cummings's equity in the land, but inferior to the mortgage debt owned by May.

Late in the year 1905 Cummings left the place and removed to another part of the state. He says that he did not intend to return. That the seasons had been too wet and the farm had not paid expenses. The last payment he had made upon May's mortgage was in 1903. That he had made no payment in 1902; that he had not paid the taxes. Before leaving the farm he had a talk with May regarding his affairs, and told May that he could not keep the place. To use his own language: "I told him that I couldn't keep the place any longer, and that I would give him a quitclaim deed, or he might foreclose, and I would waive my right of redemption; he could do either, that is, he said that he thought he could foreclose for less than the judgments that were against the land. He was to take his choice, either to take the land with the judgments against it, or to foreclose it; whichever, on investigation, he should decide was the cheapest for him; that was my understanding of it."

Q. Did he say anything about giving up the notes or anything of that kind?

Ans. I don't remember whether there was anything said about giving up the notes; I understood. . . .

Q. He didn't say anything about them?

Ans. Not that I remember of.

Q. Now, let me see if the judge and I understand you right; you

told him that he could take his choice, take a deed or foreclose, did you?

Ans. Yes.

Q. You did not at that time demand the notes back?

Ans. No.

Q. You have never demanded the notes back, have you?

Ans. I never have. There was something said about the judgments, but, as near as I can recollect, Mr. May said he thought he could foreclose for less than he could buy the judgments.

Q. I want to get at what you said to him, what was your proposition to him, what were you going to give him this deed for, if anything?

Ans. I was going to give him the deed if he took the deed to clear me from the place. My proposition was that he should pay those judgments and I give him a deed.

Q. Mr. May asked you for a warranty deed, didn't he?

Ans. He asked for a quitclaim deed.

Q. Didn't he ask you at one time for a warranty deed?

Ans. Not that I remember of. I don't remember any such talk. I offered to give him a quitclaim deed.

Q. You wouldn't say that he didn't ask you for a warranty deed, would you?

Ans. I wouldn't say, but I do not recollect it.

Q. You heard Mr. May's testimony about this conversation?

Ans. Yes.

Q. Is that substantially correct?

Ans. It is.

Mr. May, also, was a witness, and gave his recollection of this conversation. He says: "He (Cummings) came down and told me that he couldn't farm it any more; that he was going to leave the farm, he was going up where his son-in-law was; I asked him for a warranty deed, and he told me that he couldn't give me a warranty deed on account of the judgments that were against him, and he told me about the judgments at that time; but he did offer to give me a quitclaim deed. That was about all there was to it, and I did not decide what I would do for certain." "He wanted me to pay the liens."

Q. (On cross-examination) As I understand you, his proposition,

in effect, was that you release his debt, that is the debt secured by this mortgage, and that you take care of this judgment and liens, etc., against the lands.

Ans. Yes, that is what he wanted. We did not come to any definite agreement.

Q. There were a number of those liens and judgments?

Ans. Yes, there were some that I never heard of before now. I knew of the Freeman and Perry judgments. The Baker judgment I never knew of until this fall. Then Cummings moved off from the farm. I wrote him saying I declined his offer.

Q. When did you make up your mind that you wanted this deed, and how did you communicate your conclusion to Mr. Cummings?

Ans. Well, along in the summer there was a pretty fair looking crop there, and I got to thinking about who I was raising the crop for, whether for myself or somebody else, and I thought I would write to him and get a quitclaim deed to protect myself in the crop; fearing that creditors might step in and claim the crop; I was not afraid that Cummings would, but was afraid that his creditors might, and when I wrote him for the deed I did not think at all about or take into consideration the conversation we had had the fall before.

The letter written by May to Cummings reads as follows:

Aug. 6, 1906.

Mr. E. C. Cummings,

Dear Sir:—Will you please send me a quitclaim deed made to Emily E. Ray, as you offered last fall. I find it very expensive to foreclose, and believe I can settle that claim against you if I have a deed for less.

Yours truly,

C. B. May.

On the trial Mr. May further testified:

Q. Mr. May, what did you mean by that expression in your letter then?

Ans. Well, I don't hardly know what I did mean by it, but I must have meant that I thought I could settle them.

Q. Did you know what they were at that time?

Ans. No, I never knew anything about only the two. That letter had slipped my mind, I thought when I wrote to him and asked him for a deed that I did not mention anything, only asked for a deed.

Q. Do you mean to say, in that letter, you promised to pay those judgments?

Ans. No, the letter does not so state.

Q. Did you mean to take care of those judgments in that letter?

Ans. No.

Q. What did you mean, then, when you say what you did?

Ans. I didn't know but I could settle with the creditors, instead of foreclosing.

Q. Did you ever consider that you had discharged this mortgage and that it had been merged into this deed, or anything of that kind?

Ans. Why, I didn't think enough of the quitclaim deed that I wanted to record it.

Q. You thought that in spite of the deed you would have to foreclose your mortgage?

Ans. I thought I would to get title to the land, yes.

Q. What did you take the deed for, then?

Ans. To shut out the creditors on the crop I was raising.

Q. Why did you take the deed in the name of your daughter?

Ans. You have asked me something I cannot answer, for I don't know myself why I did it.

Q. You claim to own this land, do you not?

Ans. No, I can't say that I claim it. I have had possession of it.

Q. You say to this court that you do not claim to own this land?

Ans. Yes.

Q. You have authorized Mr. Hildreth, your attorney, to bring an action here in which he asserts a title in your daughter for your sole use and benefit?

Ans. I employed Mr. Hildreth to take care of this affair for me, and I turned it over to him and he has taken care of it.

Q. Do you claim that your daughter owns the farm?

Ans. Well, it is a piece of land without any ownership nearly.

Q. Do you think Mr. Cummings owns it?

Ans. He says that he doesn't, and I hardly think he does. It is a piece of land that there is a big question on about who does own it.

As will be seen from the foregoing testimony Mr. Cummings, after he had abandoned the land, gave a quitclaim deed of the same to the daughter of Mr. May, and this daughter was made plaintiff in a suit to quiet title to the land for the use and benefit of Mr. May.

At the same time Mr. May started an action to foreclose his mortgage, and made the owners of the judgments and liens parties thereto, and the two actions were tried together upon stipulation of counsel. At the close of the trial, the trial court ordered judgment that the mortgage be foreclosed, and that the action started by Emily E. May be dismissed without prejudice. The defendants have appealed from both cases. The opinion in the case of Emily E. May against the same defendants will be found in post, 286, 130 N. W. 828.

The defendants in this action desire a review of the entire case in this court. They contend, first, that the quitclaim deed to Emily E. May is in effect a deed to Clarence B. May, and was given and accepted in satisfaction of the Cummings' mortgage, and that the said mortgage became merged in Clarence B. May's title so derived, and that the judgments and liens of the defendants are the first and only encumbrances upon the land. Secondly, they claim that even if defeated in their first contention, that May is bound to credit upon the Cummings notes the reasonable value of the use of the land for the years subsequent to 1905.

Taking up the questions raised in the order named, we find it practically admitted that the question whether or not a mortgage becomes merged when the mortgagee buys the fee title depends upon the intent and interest of the mortgagee. The appellants insist, however, that this rule can be changed by contract of the parties interested, and that such a contract has been proven in the present case. We are unable to find any evidence to sustain their contention. In the first place the defendants, other than Cummings, were not parties to any contract, nor did they know of any negotiations between May and Cummings. May was laboring under the mistaken belief that his mortgage would merge, as a matter of law, as soon as he took a deed from Cummings, but there is no evidence that he desired such a result and agreed with Cummings to bring it about. During all of the time, he was hostile to the judgment creditors, and seeking a way to defeat their claims against the land. In his letter to Cummings he intimates that

he might settle with those creditors, if they accepted less than the costs of foreclosure. That he deliberately made a contract to place those hostile judgment creditors in a position where their judgments were superior to his own mortgage taken for the purchase price of the land, without any consideration on their part, is supported neither by reason nor evidence. An examination of Cumming's evidence will show that he did not claim any contract. He told May that he could not give him a deed on account of the judgments.

The findings of the learned trial court are amply supported by the evidence, and are, in our opinion, correct. We therefore adopt them as the findings of this court.

Appellant's second proposition is that May should have credited upon his mortgage debt, the value of the use of the land during the time he was in possession. We find that no evidence was offered as to the value of such use and occupation, unless it is found in the testimony of Mr. May, and he states that the farm never paid expenses while he was in possession, after Cummings had abandoned it. The burden of showing this payment was upon the defendant, and the trial court could not allow a credit for this item, owing to lack of definite evidence. The judgment is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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EMILY E. MAY, FOR THE USE AND BENEFIT OF CLARENCE B. MAY, v. EDSON C. CUMMINGS, E. A. Perry, Thomas Baker, Jr., Will Freeman, and the William H. White Lumber Company.

(130 N. W. 828.)

**Mortgages — Foreclosure — Quietting Title.**

1. The holder of a mortgage upon real estate may maintain an action to foreclose the same, at the same time he is asserting title to the same premises under a quitclaim deed from the mortgagor.

**Mortgage — Foreclosure — Quietting Title — Election of Remedies.**

2. While foreclosing his mortgage in an appropriate action, he has the right to maintain an action to quiet title based upon his quitclaim deed, and it is error for the trial court to force him to elect between the two actions.

**Appeal and Error—Invited Error.**

3. This error cannot be taken advantage of by the defendants, upon whose motion the plaintiff was forced to elect.

Opinion filed March 10, 1911.

Appeal from Cass county; *Pollock, J.*

Action by Emily E. May, for the use of Clarence B. May, against Edson C. Cummings and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

*Turner & Murphy* and *E. H. Wright*, for appellants.

*M. A. Hildreth*, for respondent.

BURKE, J. By stipulation of the parties, this case was tried in the lower court at the same time and upon the same evidence as the case of Clarence B. May v. Cummings, (ante, 281, 130 N. W. 826).

The defendant Cummings had bought of Clarence B. May a certain farm in Cass county, North Dakota, giving in payment therefor a mortgage for the entire purchase price. After some seventeen years' possession, Cummings had failed to reduce said indebtedness, and abandoned the farm to May. During his occupancy of the premises the other defendants herein had obtained against him certain judgments and one mechanics' lien. Those had attached to Cummings's equity in the land, but were inferior to the mortgage held by May. After the abandonment of the premises, and upon the request of Clarence B. May, Cummings gave a quitclaim deed to Emily E. May, a daughter of Clarence B. May, but without her consent or knowledge and upon no consideration from her.

Clarence B. May began an action to foreclose his mortgage, in his own name, and at the same time commenced this action in the name of his daughter for his use and benefit, to quiet title to the premises, and in each suit Cummings and the various lien and judgment holders were made defendants.

The defendants answered in each action by the same attorney, and the two actions were tried at the same time. Before any evidence was offered in the consolidated suit, the defendants asked the court to require the plaintiff to elect between his mortgage and the quitclaim



deed taken by his daughter for his use. This the trial court refused at first, but later on practically allowed. After the evidence was all in, the trial court ordered the plaintiff to elect in which of the two actions he desired judgment entered, and in compliance with this order and not otherwise, the use plaintiff dismissed the case at bar without prejudice. Judgment was then entered in his favor, ordering the mortgage foreclosed.

In this action the defendants have appealed and assigned as error the ruling of the trial court in allowing the use plaintiff to dismiss the suit without prejudice. It is their claim that the trial court should have proceeded to enter judgment upon the merits in this action, and that if it were to be dismissed the defendants were entitled to a dismissal with prejudice.

We have already held that May's mortgage was not merged in the quitclaim deed taken in his daughter's name. Clarence B. May v. Cummings, ante, 281, 130 N. W. 826. (1) May had the right to keep the two titles separate and distinct, and to maintain separate actions upon each. One action was to assert his claim under the mortgage, which was a first lien upon the land and good against all of the defendants. The second action was to quiet title as to Cummings, although it is hard to see how he expected to escape the liens and judgments. (2) However, it was his right to sue those people if he so desired. He was asserting this right in a proper action, when he was crowded out of court upon the motion of the defendants. Were it not for the motion and objection of the defendants, the trial court would have found the mortgage a first lien, the judgments and liens secondary, and the quitclaim deed third, such being the finding of the court in the other case.

(3) If there was error in the ruling appealed from, it was invited by the defendants, and they cannot complain. The order appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

21 N. D.—19.

LOUIS HANITCH, SUING FOR THE USE AND BENEFIT  
OF GEORGE W. LYNN, v. T. L. BEISEKER.

(130 N. W. 833.)

**Quieting Title — Action by Use Plaintiff.**

1. When a use plaintiff brings suit to quiet title in the name of his grantor, he must rely upon the title as of the date of the transfer from the nominal plaintiff to him.

**Quieting Title — Defenses against Nominal Plaintiff.**

2. The defendant may avail himself of any defense he may have had against the nominal plaintiff at the date of the transfer from the nominal to the use plaintiff.

**Quieting Title — Nominal Plaintiff — Bona Fide Purchaser.**

3. In an action brought in the name of a nominal plaintiff, the use plaintiff cannot claim to be an innocent purchaser without notice, under our recording acts.

**Quieting Title — Defenses.**

4. Courts will protect the use plaintiff in the control of the suit, and the nominal plaintiff cannot end the litigation by a deed to the defendant, after he has transferred his title to the use plaintiff. In this action, however, the defendant's deed was given prior to the deed to the use plaintiff, and the defendant may plead and prove same as a defense against the use plaintiff.

Opinion filed March 10, 1911.

Appeal from District Court, Emmons county; *Winchester, J.*

Action by Louis Hanitch, suing for the use of George W. Lynn, against T. L. Beiseker. Judgment for plaintiff, and defendant appeals.

Reversed.

*Edward H. Wright*, for appellant.

*Lynn & Coventry*, for respondent.

BURKE, J. This action involves the title to the south one half of section 11 township 135 range 77, Emmons county, North Dakota. The case was tried in the district court upon stipulation of facts substantially as follows:

On July 17, 1899, and for a long time prior thereto, Louis Hanitch was the owner of the premises, subject only to a claim of Emmons county for the tax for the years 1893 and 1894, which the county had bought in at a tax sale of the premises under the Woods law. On said July 17, 1899, Louis Hanitch sold the premises to the defendant, T. L. Beiseker, and one C. H. Davidson, Jr., giving to them a warranty deed, and exempting from the said warranty the tax claim of Emmons county. Thereafter, and on November 12th, 1901, T. L. Beiseker acquired the tax title owned by Emmons county by purchase. From and after said July 17, 1899, Hanitch was a resident of Wisconsin, and the premises were not occupied by him. Beiseker caused his tax deed from Emmons county to be recorded on November 13, 1901, but neglected to record the warranty deed from Hanitch until December 22, 1905. On March 19, 1905, the said Louis Hanitch executed and delivered to one George W. Lynn a deed of conveyance to said premises, which said deed was duly recorded on July 14, 1905, and was taken by said Lynn for a valuable consideration and without notice of the prior deed from Hanitch to Beiseker and Davidson. The facts relative to the tax deed before mentioned were also stipulated, and show facts similar to those discussed in the case of *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059; and show that the title to the land was not transferred thereunder. The stipulation is silent as to the occupation of the premises by Beiseker and Davidson at the time when Lynn obtained his title from Hanitch, but the fact that this action was brought in the name of a nominal plaintiff shows that Mr. Lynn considered his deed from Hanitch champertous and void as to Beiseker, under the decision of this court in the case of *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258. This action was brought by Lynn in the name of Louis Hanitch for the use and benefit of George W. Lynn, and T. L. Beiseker alone is named as defendant. Davidson has not been interpleaded. The complaint alleges that the plaintiff is the owner of the premises, and asks that his title be quieted as against the claims of Beiseker. It is evident that the pleader had in mind only the tax deed aforesaid, when the complaint was drawn, but no amendments to his complaint have since been offered. Beiseker made answer, setting up his tax deed and also his warranty deed from Hanitch, and asks that the court quiet title to

said premises in himself and Davidson as joint owners. The trial below resulted in findings to the effect that the use plaintiff, George W. Lynn, was the owner of the premises in fee simple, and that the defendant, T. L. Beiseker, had no interest in or lien or encumbrance upon the same. The defendant has appealed from his judgment and asks trial *de novo*.

The matter of the tax deed requires little attention, excepting to say that even if Lynn should prevail upon the showing of fee title, still, under the stipulation in this case, Beiseker would have a good and valid lien upon the land for the amount due him for taxes paid by him (*McKenzie v. Boynton*, *supra*), and the judgment of the district court would have to be modified accordingly. But as we have reached the conclusion that the plaintiff must fail in this action, the above point is not material.

When Lynn drew his complaint he was obliged to elect whether he would bring an action in his own name, or bring an action in the name of his grantor for his own use and benefit. This election must be based upon the facts in the case peculiarly within his knowledge. If he brought the action in his own name, and Beiseker could show that Hanitch had been out of possession and had collected no rents for more than one year prior to the time of the deed, then Lynn's deed from Hanitch would be champertous and void as to any person in possession under color of title, as held by this court in the case of *Galbraith v. Payne*, *supra*. On the other hand, if Lynn brought the suit in the name of his grantor, he would have to stand upon the title that his grantor had at the time of the execution of the deed to Lynn; to wit, March 16, 1905. If Hanitch had good title at that date, the deed to Lynn would convey the same. If upon that date Hanitch had no title, of course Lynn would be unable to derive good title from him.

We are not called upon to decide whether Lynn made a wise choice of actions. Nor are we to decide whether he could have maintained an action in his own name had he elected to bring one. The fact is, he elected to sue in the name of his grantor. Lynn is, of course, the real party in interest, and has complete control of this action. If he can show any title to have been in Hanitch upon March 16, 1905, title passes to him under his deed.

Knowing all the facts of his case, Lynn has elected to sue in the name of his grantor. His reason for this no doubt was knowledge that the deed he had obtained from Hanitch was champertous and void as to Beiseker. He therefore elected to follow the other course, and stand in this action upon the title that Louis Hanitch had March 16, 1905, when the deed was issued to him. Under those facts we must hold that, at said date, Louis Hanitch had no title to the premises, having already conveyed his title to Beiseker and Davidson, and no title can pass in this action to Lynn.

The plaintiff has asked us to ignore the form of the action, and try this case as though it had been brought in the name of Lynn directly, and calls our attention to the fact that the courts now protect the use plaintiff from defenses which were good only against the nominal plaintiff. 30 Cyc. Law & Proc. p. 41, and cases cited. He forgets that the defendant also has some rights. The defendant was induced to enter into a stipulation of facts, on the supposition that he was to contest the title held by Louis Hanitch upon March 16, 1905. Whether, in an action brought by Lynn in his own name, he would have made a similar stipulation, we cannot say; but we know it would be a great injustice to allow a new plaintiff to be substituted in the supreme court, change the cause of action entirely, and still hold the defendant to his stipulation. It is possible that, under the true facts in this case, Lynn may be able to maintain an action against Beiseker and Davidson in his own name and establish his title to the premises, but we have not before us sufficient facts to decide such a controversy, even if it were equitable to substitute plaintiffs in this court.

We have examined all of the cases cited by plaintiff in his brief and such others as we have been ourselves able to find. The case of *Jones v. Witter*, 13 Mass. 304, is a fair sample of the cases relied upon by plaintiff. In that case the nominal plaintiff had sold to the use plaintiff a note given by the defendant, but had failed to indorse same. The use plaintiff therefore was obliged, under the laws in force at that time, to sue in the name of a nominal plaintiff. Upon the trial the defendant offered to prove that he had paid the nominal plaintiff for the note, and offered in evidence a receipt for the same, which receipt, however, was dated after the transfer of the note from the nominal plaintiff to the use plaintiff. The court excluded this

evidence, but held that the defendant could show any payment made to the nominal plaintiff *before* the transfer of the note to the use plaintiff. Applying the principle of that case to the cause under consideration, it would mean that Beiseker could show in this action any title which he had obtained from Hanitch *before* the date of Lynn's deed, but that Lynn, having control thereof, had the sole right to terminate the same, and that Hanitch could not terminate the suit by giving a deed to Beiseker. Again, if Beiseker had had no deed from Hanitch, in the first place, but had relied upon his tax deed, and had been sued by Lynn in Hanitch's name, and pending suit had obtained a deed from Hanitch to himself, the courts would have prevented him from asserting such deed against Lynn. The courts will abundantly protect the substantial rights of the parties to an action, of course; but we have found no court that has gone so far as to allow the nominal plaintiff to sue the defendant to whom he has sold a farm, and wrest that farm from him for the use and benefit of his second grantee, who was unable or unwilling to maintain a suit in his own name.

In view of the possibility that Lynn may have a good cause of action in his own name, we will simply direct the trial court to dismiss the present action, with costs of both courts in favor of appellant.

All concur, except MORGAN, Ch. J., not participating.

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### C. W. TURNER v. CRUMPTON & CRUMPTON.

(130 N. W. 937.)

#### **Factors and Brokers — Employment — Evidence — Words and Phrases.**

The evidence examined and held to show that the employment of the defendants by the plaintiff was under a contract authorizing them to act as factors for the plaintiff, and not as plaintiff's brokers. Hence defendants had the right to purchase grain in their own names and ship the same to plaintiff, retaining title in themselves as security for their advances to plaintiff.

Opinion filed March 14, 1911.

'Appeal from Nelson county court; *Templeton, J.*

Action by C. W. Turner against Crumpton & Crumpton. From the judgment, defendants appeal.

Reversed and remanded.

*Frich & Kelly*, for appellants.

If "A" employs "B" to go into the market and "get" an article and send it to him, and "B" does so, pays for it and the freight, he is entitled to recover from "A" the money advanced and reasonable compensation. *Green v. Feil*, 41 Wis. 620; *Clifton v. Ross*, 60 Ark. 97, 28 S. W. 1085; *Brown v. Clayton*, 12 Ga. 564; *Dow v. Worthen*, 37 Vt. 108; *Bartlett v. Smith*, 4 McCrary, 388, 13 Fed. 263; *Thompson Bros. v. Cummings*, 68 Ga. 124; *Wyeth v. Walzl*, 43 Md. 426; *Field v. Banker*, 9 Bosw. 467; *Finlay v. Stewart*, 56 Pa. 183; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Ruffner v. Hewitt*, 7 W. Va. 585; *Hoy v. Reade*, 1 Sweeny, 626; *Wiger v. Carr*, 131 Iowa, 584, 11 L.R.A.(N.S.) 650, 111 N. W. 657, 11 A. & E. Ann. Cas. 998, and cases; 31 Cyc. Law & Proc. p. 1532.

Defendants' lien on the goods warranted their preventing delivery. *Tiedeman, Sales*, § 126, and cases cited; 31 Cyc. Law & Proc. p. 1545.

Defendants could assert their lien, or waive it and enforce their personal remedy against plaintiff. *Burrill v. Phillips*, 1 Gall. 360; Fed. Cas. No. 2,200; *Peisch v. Dickson*, 1 Mason, 9; Fed. Cas. No. 10,911; *Martin v. Pope*, 6 Ala. 532, 41 Am. Dec. 66; *Beckwith v. Sibley*, 11 Pick. 482; *Dolan v. Thompson*, 126 Mass. 183; *Zoit v. Millaudon*, 4 Mart. N. S. 470; *De Bavier v. Funke*, 50 N. Y. S. R. 442, 21 N. Y. Supp. 410, affirmed in 142 N. Y. 633, 37 N. E. 566; *Willingham v. Rushing*, 105 Ga. 72, 31 S. E. 130; *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987.

*John J. Samson and Skulason & Burtness*, for respondents.

The case is controlled by *Robbins v. Maher*, 14 N. D. 228, 103 N. W. 755.

Goss, J. The plaintiff, a resident of Warwick, this state, at various times between the 1st of September, 1906, and the 22d of May, 1907, shipped to the defendants, who were commission men of Duluth, Minnesota, grain aggregating over forty carloads, to be sold by the defendants for him; and on August 24, 1908, the defendants were indebted to plaintiff, as a balance on said transactions, in the sum of \$325.67, to recover which plaintiff began this action. The defendants admit their

indebtedness to the plaintiff in said amount because of said transactions, but by way of defense counterclaim in the sum of \$599.93 for loss claimed to have been sustained by them upon a shipment by them to plaintiff in April, 1907, of 2,000 bushels of corn, which was refused by plaintiff and then resold by them at a loss in said amount. The counterclaim was denied; plaintiff alleging that the corn on arrival at Warwick had been damaged because of carelessness of the defendants and that the transaction was thereupon rescinded.

The corn was ordered by letter. The correspondence between the parties constitutes the contract and consists of the letters herein set forth in full.

A letter of plaintiff addressed to defendants at Duluth, Minnesota, under date of March 7, 1907, reading:

"I would like to have you send me a car of corn and don't know whether you can get it there or not, or if it would be cheaper in Minneapolis, and as there is no agent here, I don't know when the seed rate starts, as I don't want it shipped until I can get seed rates. Wish you would look this up, and if the seed rate is on, send me a car of 1,000 bu. to Warwick. Please let me know what you can do on this matter and oblige."

To this letter defendants replied from Duluth, Minnesota, under date of March 11, 1907, addressed to plaintiff, as follows:

"You spoke about wanting a car of corn, but we will have to look into the matter first, and will report to you what we can do regarding it, and you can then notify us when to ship the same."

On April 5th following, the plaintiff wrote defendants in substance the following:

"I have been waiting to hear from you about that car of corn I ordered sometime ago, but have not heard anything. I have sold about 2,000 bu. and I wish you would send me another car as soon as possible; and, if you have not sent me any yet, send two cars, as I have it sold, and the farmers want to get it right away. I am going to buy some flax for a while and I want the corn to sell at the same time. Please let me hear from you."

To which defendants replied under date of April 8, 1907, from Duluth, Minnesota, addressed to plaintiff:

"Yours of the 5th received, asking us to order two cars of corn



shipped you at Warwick, which we have done, instructing our office at Minneapolis to ship you two 1,000 bu. cars of corn as directed, and as soon as we get word from them will inform you what they had got for you, and very likely it will be at your place in the near future."

And immediately thereafter defendants had their Minneapolis office, in defendant's firm name, buy 2,000 bushels of corn and ship the same in two cars to plaintiff, at Warwick. The corn was bought in Minneapolis because it could not be purchased in Duluth.

On April 11, 1907, defendants wrote plaintiff as follows:

"We have received word from our Minneapolis office that they purchased two cars of yellow No. 4 corn at 38 cents f. o. b. mpls. and that about 1,000 bu. will be loaded in each car and billed you at Warwick as directed. This corn was bought at one cent less than No. 3 yellow, and it is good yellow corn, fairly sound, and will keep just as well as the No. 3 corn. We trust there will be no delay in transit and that you will be satisfied with the purchase."

The foregoing letters were received in due course of mail by the respective parties to whom they were addressed.

When the corn arrived it was unfit for seed; it having germinated, heated, and spoiled in transit. Plaintiff refused to accept it, whereupon defendants ordered it returned, and pursuant to the custom of the Minneapolis market resold the same at that place in the open market, charging plaintiff's account with the loss, leaving him indebted thereby to defendants in the sum of \$276, for which defendants demand judgment of plaintiff on their counterclaim.

It is noticeable that the contract of employment to make the purchase of this grain was not dealing in futures, but instead contemplated the actual purchase and delivery of corn already resold for seed purposes by the defendant pending its arrival. The transaction, then, is in no wise a gambling transaction; it was an order from a purchaser to this commission firm, directing them to procure immediately the corn at Duluth or Minneapolis, wherever cheapest, with explicit instruction for immediate shipment to such purchaser. The order was complied with to the letter, and immediately full information of the purchase, including quantity, price, and shipment, was communicated to the purchaser. Had the defendants owned the corn when the order was received, and filled the order by immediate shipment to the plaintiff, it

would have been an ordinary purchase and sale. But plaintiff was in the elevator business, and the order was given to the commission firm usually used by him as his selling agent of grain purchased in the course of his business, and shipped to them to sell for him. Instead of the usual sale, this order was for a purchase, directing his commission men to obtain and send him the corn immediately. Plaintiff testifies that when he gave the order he expected that the defendants would have to go into the open market at Duluth or Minneapolis to get the grain, and that he did not tell them where to buy it, but that he expected it to be inspected out of the elevator where it was purchased. A reasonable construction of the letters would be that defendants should purchase the grain, and from plaintiff's own testimony he so intended they should act. Under the terms of the employment, the commission agents were by necessary implication given authority to purchase in their own names. The order necessarily implied the advancement by them of their credit or money in the procurement of the grain for shipment.

Under this state of facts they bought the corn, paying for it themselves, immediately shipping it to plaintiff, and, instead of accompanying the consignment with the usual bill of lading, charged plaintiff's account therewith. They owed him an open account over \$300, as a balance due on previous consignments shipped to them for sale. It was but natural that they should charge his account with this transaction of a similar nature.

In what capacity, then, did defendants act for plaintiff in such purchase? If the transaction is one of brokerage and a matter in which defendants acted in the capacity of brokers for the plaintiff, the action of the trial court in striking all evidence of a counterclaim from the record and advising a verdict for the plaintiff was proper, under *Robbins v. Maher*, 14 N. D. 228, 103 N. W. 755, and all authorities. In fact, the record discloses that the learned trial judge based his ruling upon the above holding. Defendants, however, contend that they acted for plaintiff as factors for him. If so, they had the right to purchase in their own names, and can urge their counterclaim for damages based on defendants' refusal to accept the grain so purchased for him.

"The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation for a compensation commonly called

brokerage. Or, to use the brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name but in the names of those who employ him. Where he is employed to buy or to sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name. He is strictly, therefore, a middleman or intermediate negotiator between the parties." Story, Agency, § 28. Again, a broker is defined as "one whose occupation it is to bring parties together to bargain, or to bargain for them, in matters of trade, commerce, or navigation; he is essentially a middleman or go-between." Mechem, Agency, § 13. "He [a broker] differs from a factor also, in that he does not ordinarily have the possession of the property which he may be employed to sell, and that his contracts are always made in the name of his employer. As will be seen, he is primarily the agent of the first person who employs him, and he cannot, without the full and free consent of both, be throughout the transaction the agent of both parties." Mechem, Agency, § 927. Again: "Brokers are agents who are engaged to negotiate contracts for other persons relative to property, with the custody of which they have no concern. . . . He is a mere negotiator between the other parties. It is the duty of a broker to bring the contracting parties together for the purpose of making a contract, or he may, if so authorized, make the contract for them. . . . Merchandise brokers are those who negotiate the sale of merchandise without having the possession or control of it as factors have." Reinhard, Agency, § 21. "The features which mainly distinguish a factor from a broker are: The former is intrusted with the possession, disposal, and control of the property, and may sell it in his own name and bind the principal; . . . the broker is, strictly speaking, a middleman or intermediate negotiator between the parties, and is not in the fiduciary relation of an agent to his principal, but must favor neither the one nor the other of the parties between whom he effects a transaction." 19 Cyc. Law & Proc. p. 116.

The foregoing definitions are but illustrative of every definition of the term "broker," which term is not defined by our statute.

A "factor" is defined by our statute as follows (Rev. Codes 1905):

Section 5801: "A factor is an agent who is employed to buy or sell property in his own name, and who is intrusted by his principal with the possession thereof, as defined in § 5582."

"Section 5582. A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

It will be noticed the two sections together as quoted constitute the statutory definition of factor, and that a factor may buy as well as sell property the subject of the agency. But, in the absence of a statute as broad as ours declaring that a factor may buy as well as sell property, the courts have held the term "factor" to apply to a purchasing agent, as well as to one employed to sell property. *Price v. Wisconsin M. & F. Ins. Co.* 43 Wis. 267, in an opinion by Chief Justice Ryan, to the effect that "a factor is an agent to buy or to sell." A factor may buy and sell in his own name as well as in the name of his principal; a factor buying goods for his principal in his own name is personally liable for the price. *Story, Agency*, § 110. To the same effect is *McGraft v. Rugee*, 60 Wis. 406, 50 Am. Rep. 378, 19 N. W. 530, and *Beardsley v. Schmidt*, 120 Wis. 405, 102 Am. St. Rep. 991, 98 N. W. 235.

Under the testimony, it conclusively appears that the statutory definition of "factor" covers the relation existing between the parties, and that being the nature of the agency, the brokerage case of *Robins v. Maher*, upon which the court based its decision, does not control the decision of this action. The commission men had the right to purchase this grain and retain the title until paid for, under the authority necessarily implied granted the defendants by the letters of plaintiff.

"Where an agent purchases goods intended for his principal, but, according to the express or implied agreement of the parties, buys them upon his own credit, or with funds furnished by himself, he may retain the title to the goods until they are paid for by the principal." *Mechem, Agency*, § 689; *Farmers' & M. Nat. Bank v. Logan*, 74 N. Y. 568; *Farmers' & M. Nat. Bank v. Atkinson*, 74 N. Y. 587; *First Nat. Bank v. Shaw*, 61 N. Y. 283; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818.

In *Moors v. Kidder* above cited, in the opinion of the court we find

the following statement: "The doctrine stated was in substance [referring to *Farmers' & M. Nat. Bank v. Logan*] that where a commercial correspondent, however, set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property, and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid." The defendants stood in the relation of vendors to plaintiff vendee in this transaction.

Under the evidence and the foregoing authorities, we are constrained to hold that the defendants in the transaction in question were the factors of the plaintiff, and as such they were authorized to construe the letters as a direction to purchase as a necessary incident to the procurement of the grain to be sent plaintiff. But granting for the sake of argument that the letters are ambiguous as to defendants' authority so to act, the defendants have acted in good faith under the construction that they should purchase in their own names, and ship, and thereby act as factors of the plaintiff, and he is bound by their reasonable construction of the order to that effect. They had in previous dealings acted as factors in selling grain, and if plaintiff did not intend they should act in such capacity, and should so construe his order, his directions should have been unambiguous in this particular. "The instructions given by a principal to his factor must be clear and distinct and express, and not a mere communication of an expectation or belief as to the result of a transaction; and if they are so ambiguous that they are capable of more than one construction, and the factor, in good faith, acts according to one, he cannot be held liable if loss ensue, because the principal intended that he should act according to the other." 2 Clark & S. Agency, page 1789 and cases cited.

For the foregoing reasons, the judgment ordered must be reversed. Defendants in the trial court made a motion for judgment notwithstanding the verdict. But plaintiff has interposed a reply to the counterclaim. The trial court held against the validity of the counterclaim, and struck out the evidence tending to establish it. This rendered it unnecessary for plaintiff to offer any testimony under his reply to the counterclaim.

Hence no such evidence was offered or received, and it appears that if the case be retried one issue for determination may be that tendered by the counterclaim and reply thereto. On a retrial, then, the parties may try this issue, and may offer more and other proof than that now before the court. Under this state of the record, following *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183, it is our duty to deny the motion for judgment notwithstanding the verdict, and remand the case for retrial. It is so ordered.

All concur, except MORGAN, Ch. J., not participating.

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AUG. SCHULZ, Daniel Schulz, Otto Schulz, John Schulz, a copartnership under the name of Aug. Schulz & Sons v. JOHN DAHL

(130 N. W. 937.)

**Justice of the Peace—Appeal—Approval of Bond.**

The Code relating to appeals to the district court from judgments in the court of a justice of the peace requires the execution on the part of the appellant, by sufficient surety, of an appeal bond, which must be approved and filed in the office of the clerk of the district court to which the appeal is taken.

Appellant appealed from a judgment of a justice of the peace to the district court, and filed such undertaking. The clerk neglected to indorse the same or make any entry of his approval thereof, but filed the undertaking, and notified the justice of the appeal and directed him to transmit the record to the district court, as required by § 8507, Rev. Codes, 1905.

*Held*, that the notice given by the clerk to the justice which could only be given in case the undertaking met with the approval of the clerk is presumptive evidence of such approval, notwithstanding his failure to make his formal entry or indorsement of approval.

Opinion filed March 16, 1911.

'Appeal from District Court, McLean county; *Winchester, J.*

Action by Aug. Schulz and others against John Dahl. Judgment for plaintiffs, and defendant appeals.

Reversed and remanded.

*Hyland & Nuessle*, for appellant.

If sureties sign bond on appeal it is sufficient, under the statute, if

the obligor fails to sign. *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557; *Howard v. Manderfield*, 31 Minn. 341, 17 N. W. 946; *Pierse v. Miles*, 5 Mont. 551, 6 Pac. 347; *Leffingwell v. Chave*, 19 How. Pr. 57; *Board of Education v. Sweeney*, 1 S. D. 642, 36 Am. St. Rep. 767, 48 N. W. 302; *Curtis v. Richards*, 9 Cal. 34; *Shakman v. Koch*, 93 Wis. 595, 67 N. W. 925.

Where Code is silent as to mode of approval, any act showing acceptance of appeal bond by clerk is sufficient. *Griffith v. Robinson*, 19 Tex. 219; *Hyde v. Adams*, 80 Ala. 111; *Mandel v. Peet*, 18 Ark. 236; *Levi v. Darling*, 28 Ind. 497; *Whitman Agri. Asso. v. National R. Electric & Industrial Asso.* 45 Mo. App. 90; *State use of Young v. Hessel-meyer*, 34 Mo. 76; *Bascom v. Smith*, 31 N. Y. 597; *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860.

*J. E. Nelson*, for respondent.

Approval of appeal bond is jurisdictional. *Thompson v. Fargo Heating & Plumbing Co.* 14 N. D. 405, 104 N. W. 525; *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860.

SPALDING, J. The defendant, who is the appellant in this case, feels aggrieved at the action of the district court of McLean county in dismissing his appeal from a judgment entered after trial on the merits in justice court of that county, in the sum of \$3.10, and he has taken his grievance so seriously to heart that he demands that this court listen to arguments thereon, and devote its time to relieve him from the burdens which he claims are so unjustly laid upon him.

It seems to the writer that a very considerable portion of the time of this court is occupied in the consideration of appeals in which only trifling amounts are involved, and that, in view of the fact that the court can, with difficulty, keep pace with the increasing litigation of the state, some of our reformers who are complaining so loudly about the delays incident to litigation, might profitably devote a little effort to secure the adoption of suitable provisions whereby litigation of the character disclosed by the record herein might be brought to a termination before it gets into this court, especially when it is sought to establish no important legal principle.

Briefly, the facts are, that respondent sued appellant in justice court for \$3.10. On trial, respondent obtained judgment. Appellant ap-

pealed to the district court, furnishing and filing, with his notice of appeal, an undertaking as required by law. The clerk of the district court marked the undertaking "filed," but failed to indorse thereon a minute of his approval. He, however, notified the justice that an appeal had been taken, and directed him to transmit the record to the district court, which he did in accordance with the provisions of § 8507, Rev. Codes 1905.

The defendant himself neglected to sign the undertaking on appeal, and in due time the respondent submitted a motion to the district court for the dismissal of the appeal, upon the two grounds,—that the principal had not executed the undertaking and that the clerk had not approved such undertaking; and the appeal was dismissed. From the order of the court dismissing it, the defendant appeals to this court.

Respondent abandons his original contention that it was necessary for the principal to execute the undertaking, and this leaves, as the only question for our consideration, whether any effect can be given the undertaking when it fails to disclose the formal approval of the clerk. Our first impression was that the act of the clerk in approving or disapproving the undertaking could only be evidenced by an indorsement either on the undertaking or on his docket, but an examination of the authorities discloses that, with the possible exception of Colorado, they are practically unanimous in holding that any act on the part of the clerk inconsistent with a disapproval of the undertaking, or which could not be legally done unless the undertaking, had been approved, raises a presumption or inference of approval. In this case the notice to the justice, which could only be given in case the undertaking met with the approval of the clerk, is evidence from which such approval will be inferred, notwithstanding his failure to make a formal entry or indorsement of approval. *Griffith v. Robinson*, 19 Tex. 219; *Hyde v. Adams*, 80 Ala. 111; *Mandel v. Peet*, 18 Ark. 236; *Whitman Agri. Asso. v. National R. Electric & Industrial Asso.* 45 Mo. App. 90; *State use of Young v. Hesselmeyer*, 34 Mo. 76; *Levi v. Darling*, 28 Ind. 497; *Bowles v. Page*, 20 Wis. 310; 4 Am. & Eng. Enc. Law, p. 871, note 11, & p. 872, notes 12 & 13; 4 Cyc. Law & Proc. p. 537.

For this reason the order of the District Court is reversed, and the cause is remanded for further proceedings.

All concur, except MORGAN, Ch. J., not participating.



J. H. THOMPKINS, A. L. Brush, N. Davis, Wm. Dunnell, C. L. Prescott, P. B. Anderson, W. A. Hall, Eugene Teutsch, and F. B. Lambert, as Trustees of the Vincent Methodist Episcopal Church of Minot, North Dakota v. D. A. DINNIE.

(130 N. W. 935.)

**Subscription — Contributions and Performance Thereof.**

1. The appellant signed a subscription to aid in the erection of a new church. The subscription paper which he signed read: "In consideration of our mutual promise, we, the undersigned, promise and agree to pay to. . . . All subscriptions are due and payable, unless otherwise stipulated on this list, one half when the contract for the building is let, and one half when it is inclosed, and it is expressly understood that these subscriptions shall not be binding until at least \$6,000 is subscribed or provided for in aid of the work."

*Held*, that the subscriptions became binding when \$6,000 was subscribed or provided for.

**Subscriptions — Actions — Evidence.**

2. Plaintiff submitted evidence tending to show that all the conditions of the subscription paper had been complied with on the part of the respondent. Appellant offered to prove a parole agreement with the pastor of the church, that his subscription should not be binding unless the pastor who took it continued as pastor of the church, and that he did not so continue; and that he undertook to cancel his subscription when only about \$3,000 was subscribed.

*Held*, that the offer was ineffectual, and that the trial court did not err in excluding the evidence in accordance with the offer, because it was expressly stated by counsel for appellant that he could not show that his subscription was in fact canceled, and he did not offer to prove that \$6,000 was not provided for when he attempted to cancel his subscription.

Opinion filed March 22, 1911.

Appeal from District Court, Ward county; *Burr*, Special Judge.

Action by J. H. Thompkins and others against D. A. Dinnie. Judgment for plaintiffs, and defendant appeals.

Affirmed.

*R. H. Bosard* and *G. W. Twiford*, for appellant.

Until the amount to be raised on which a subscription is to be bind-

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Note.—Admissibility of evidence of collateral parole agreements to vary terms of written contract generally, see note in 17 L.R.A. 273.

21 N. D.—20.

ing is so raised, the subscriber is not bound, and can cancel his subscription. *Stewart v. Hamilton College*, 2 Denio, 403; *Barnes v. Perine*, 9 Barb. 202; *Johnston v. Wabash College*, 2 Ind. 555.

Until an expense has been made or money expended on the faith of a subscription list, a subscriber may cancel his subscription. 9 Cyc. Law & Proc. p. 332.

Unless the subscriber made a valid contract to pay, whether a requisite amount was subscribed by others or not, his act was a mere offer subject to revocation. *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L.R.A. 636, 44 S. W. 454; *Grand Lodge, I. O. G. T. v. Farnham*, 70 Cal. 158, 11 Pac. 592; *McClure v. Wilson*, 43 Ill. 356; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L.R.A. 807, 23 N. E. 177; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652; *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829, 3 N. E. 601.

Revocation before the amount to be raised was subscribed canceled the subscription. *American L. Ins. Co. v. Melcher*, 132 Iowa, 324, 109 N. W. 805.

*F. B. Lambert*, for respondent.

That subscription list was signed upon certain conditions outside of the list cannot be shown. *Hutchinson v. Cleary*, 3 N. D. 270, 55 N. W. 729; *Barnard & L. Mfg. Co. v. Galloway*, 5 S. D. 205, 58 N. W. 565; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181; *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088; *Cottage Hospital v. Merrill*, 92 Iowa, 649, 61 N. W. 490; *University of Des Moines v. Livingston*, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738; *Blair v. Buttolph*, 72 Iowa, 31 33 N. W. 349; *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa, 436, 61 N. W. 957; *McDonald v. Gray*, 11 Iowa, 508, 79 Am. Dec. 509; *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

A subscription to a common object with others, though gratuitous, creates a legal liability. *Christian College v. Hendley*, 49 Cal. 347; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Somers v. Minor*, 9 Conn. 458; *North Ecclesiastical Soc. v. Matson*, 36 Conn. 26; *Norton v. Janvier*, 5 Harr. (Del.) 346; *Kentucky Baptist Edu. Soc. v. Carter*, 72 Ill. 247; *Johnston v. Wabash College*, 2 Ind. 555; *Snell v. Methodist Episcopal Church Soc.* 58 Ill. 290; *McDonald v. Gray*, 11

Iowa, 508, 79 Am. Dec. 509; First M. E. Church v. Donnell, 95 Iowa, 494, 64 N. W. 412; Kentucky Female Orphan School v. Fleming, 10 Bush, 234; Parsonage Fund v. Ripley, 6 Me. 442; Church & Congregation v. Stetson, 5 Pick. 506; Fisher v. Ellis, 3 Pick. 322; Williams College v. Danforth, 12 Pick 541; Thompson v. Page, 1 Met. 565; Ladies' Collegiate Institute v. French, 16 Gray, 196; Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652; Comstock v. Howd, 15 Mich. 237.

SPALDING, J. This action was brought on a subscription made by the defendant and appellant toward a fund being raised in July, 1905, with which to erect a new Methodist Episcopal Church in Minot. Plaintiffs and respondents are the trustees of that church. The complaint alleges the incorporation of the church, the trusteeship of the plaintiffs, that in 1905 the then trustees were contemplating the erection and furnishing of a new brick church in the city of Minot, and that defendant, to enable the plaintiffs to complete the building, and in consideration of the like agreement and subscription of other parties, subscribed in writing and promised to pay \$100 for that purpose, under a contract in the following form, to wit:

#### M. E. Church Subscription.

In consideration of our mutual promise, we, the undersigned, promise and agree to pay to the Trustees of the Vincent Methodist Episcopal Church of Minot, North Dakota, the amounts set opposite our respective names toward the erection and furnishing of a new brick church costing not less than ten thousand dollars (\$10,000), to be erected either in the year 1905 or 1906 on the site where the old church stands. All subscriptions are due and payable "unless otherwise stipulated on this list," one half when the contract for the building is let and one half when it is inclosed, and it is expressly understood that these subscriptions shall not be binding until at least six thousand dollars (\$6,000) is subscribed or provided for aid in the work.

That, relying on said subscription of the defendant, the plaintiffs let the contract for the completion of such building and built the same, and expended the sum of more than \$12,000, and incurred liabilities to the amount of \$6,000 more in doing so, and that they have performed

all of the conditions of said subscription agreement; that no part of the defendant's subscription has been paid.

For answer, the incorporation, trusteeship, and purpose of building a new church are admitted. Defendant then alleges that in the year 1905, one DeLong was pastor of the Methodist Episcopal Church of Minot, and that said DeLong requested the defendant to subscribe towards the erection of the church, and that the defendant signed the subscription list upon the express condition made with said De Long at the time of signing the same, that his subscription was not to be binding or of any force or effect unless said De Long remained as pastor of said church; that prior to the erection of the church, DeLong was transferred from Minot, and that, prior to his leaving, defendant's subscription was canceled and rescinded, and the said trustees were notified of such cancelation and rescission prior to the incurring of any liability whatsoever.

On the trial of the action it was shown by plaintiffs that the church was built in the spring of 1906 and cost \$17,000, and was built on the site where the old church stood; that they got subscriptions for the whole amount, and that the contract was let for \$13,800, without extras; that defendant had not paid his subscription; that the church was completed in December, 1906, when the amount necessary to complete the payments therefor was raised, and that prior to DeLong's leaving Minot he turned the subscription list, which he had circulated, over to the president of the board of trustees.

The defendant attempted to show by parole evidence that, prior to leaving Minot, DeLong took the subscription list to the trustees, after his services were finished and he was about to leave, and checked it over with them as to the amount that was subscribed, and also the amount that they considered good on the subscription list, and, at that time, notified them in regard to appellant's request that he be released, and as to what he advised the appellant, but stated to the court that he could not show that the board agreed to release him. This evidence was excluded on objection, and he then attempted to show a conversation between him and DeLong at the time his subscription was taken, showing the conditions set forth in the answer. He was not permitted to show these things. After both parties rested, plaintiffs made a motion for a directed verdict, and at the suggestion of the court the defendant made an offer to prove that at the time of the signing of

the subscription it was signed on the condition that said DeLong remain in Minot as pastor of the church, and should proceed with the building thereof; that in October, 1905, he was transferred therefrom to Fargo, at which time no steps had been taken toward the building of the church described, and no obligations incurred on that account, and that at said time there was subscribed for the purpose named only about \$3,000; that immediately prior to the time that DeLong left Minot he advised defendant that he was going to leave, and that thereupon, and prior to his leaving, he notified the trustees that the defendant would not pay his subscription, on account of DeLong's leaving, and that they should cancel it; that thereafter DeLong advised the defendant that he had canceled the subscription.

The plaintiffs consented that the defendant might submit any proof as to the amount of the subscriptions that were made toward the building of the church in October, 1905, and also as to when DeLong was transferred from Minot, and offered suitable objection to proof as to the remainder of the offer, and the court permitted defendant to prove such facts, and denied the remainder of his offer; whereupon portions of the deposition of said DeLong were read; wherein he testified that Thompson, one of the plaintiffs, was president of the board of trustees, and that he, DeLong, had about \$3,000 subscription then, and that they considered \$2,500 of it good. On renewing the motion for a directed verdict, it was granted.

Giving the most liberal construction to the contract of subscription signed by the appellant which it will bear, he may have been entitled to cancel his subscription before \$6,000 had been subscribed or provided for. The contract reads that it shall not be binding "until." This might reasonably be construed as having been used in the sense of "unless," but taking it literally as intended to be binding only after the sum mentioned should be subscribed or provided for, it must be equally clear that it became binding on that sum being subscribed or provided.

The defendant did not attempt to show that the subscription paper which he signed when in the hands of DeLong was the only subscription paper circulated or in existence at that time. Neither did he offer to show that the sum of \$6,000 had not been subscribed or provided for, his offer only covering the subscription paper of DeLong. It is within the knowledge of all, that provisions are made for the

erection of churches in other ways than by securing signatures to a subscription paper; and even though appellant had offered to show that DeLong's subscription paper was the only one in existence at any time, his offer would still have been insufficient in view of its not covering other methods of providing for funds to erect the church.

The evidence on the part of the plaintiffs tended to show that they never had been notified of any desire on the part of Dinnie to withdraw his subscription, and had no knowledge of the parole agreement claimed to have been made. It must be apparent that, not having offered to show that \$6,000 was not subscribed or provided for, the parole evidence offered was inadmissible even from the standpoint and under the pleadings of the appellant. It follows that the judgment of the District Court must be affirmed. It is affirmed.

All concur, except MORGAN, Ch. J., not participating.

Goss, J., being disqualified, did not sit; Hon. W. H. WINCHESTER, Judge of the Sixth Judicial District, sitting in his place by request.

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## STATE OF NORTH DAKOTA v. FRIEDRICH BRANDNER.

(130 N. W. 941.)

### **Constitutional Law — Bastardy Act — Title of Act.**

1. Chapter 5 of the Code of Criminal Procedure of the year 1895, commonly known as the bastardy act, does not violate § 61 of our state Constitution. Said act is quasi criminal in its procedure and is germane to the title of said Code.

### **Bastardy Proceedings — Nature.**

2. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, Revised Codes 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proof were properly refused. Instructions given examined and found correct.

### **Witnesses — Leading Questions — Discretion of Court.**

3. Trial courts are vested with wide discretion in ruling upon the admission of leading questions. The complainant was eighteen years of age, without education, who gave her testimony through an interpreter; she was being examined about acts of illicit intercourse and the birth of a bastard child

born to her three weeks prior to the trial. Under those circumstances the trial court properly allowed the state to ask leading questions.

**Conduct of Trial—Jury—Consideration of Evidence.**

4. The jury are not bound to believe or to disbelieve the entire evidence of any witness. It is their duty to examine all of the evidence offered, and to arrive at the truth regarding the matter in dispute. Evidence examined and found to sustain the verdict of the jury.

**Criminal Law—New Trial—Cumulative Evidence.**

5. A new trial will not be granted upon the ground of newly discovered evidence, when such evidence is merely cumulative.

Opinion filed March 22, 1911.

Appeal from District Court, McIntosh county; *Allen, J.*

Friedrich Brandner was adjudged to be the father of a bastard child, and he appeals.

Affirmed.

*Wolfe & Schneller and Hugo P. Remington*, for appellant.

No statute is unconstitutional because its title is too broad or general, if all parts are germane to the one subject expressed in the title. *State v. Morgan*, 2 S. D. 32, 48 N. W. 314; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *State ex rel. Poole v. Peake*, 18 N. D. 101, 120 N. W. 47.

"Criminal procedure" must deal with some proceeding relating to crime. *Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871; 1 Bishop, *Crim. Law*, ¶ 43; *Black, Law Dict.* p. 301; 12 *Cyc. Law & Proc.* p. 130, and notes 4 & 5; *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61.

The bastardy act is unconstitutional. *State v. Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375.

The bastardy proceeding is a civil one. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Goddard v. State*, 39 Ind. App. 42, 78 N. E. 257; *State v. Tieman*, *supra*; *Williams v. State*, 117 Ala. 199, 23 So. 42; *Re Wheeler*, 34 Kan. 96, 8 Pac. 276, 6 Am. Crim. Rep. 70; *Hawes v. Gustin*, 2 Allen, 402; *State v. Liles*, 134 N. C. 735, 47 S. E. 750; *Bell v. Territory*, 8 Okla. 75, 56 Pac. 853; *State v. Knowles*, 10 S. D. 471, 74 N. W. 201; *State v. McKnight*, 7 N. D. 444, 75 N. W. 790; *Rose v. People*, 81 Ill. App. 128.

Bastardy law has nothing to do with criminal procedure. *Vinsant*

v. Knox, 27 Ark. 266; People ex rel. Atty. Gen. v. Parvin, 74 Cal. 548, 16 Pac. 490; State ex rel. Woodsides v. McDaniel, 19 S. C. 114; Van Houton v. People, 22 Colo. 53, 43 Pac. 137; Re Howard County, 15 Kan. 194; Laramie County v. Stone, 7 Wyo. 280, 51 Pac. 605; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; State v. Mitchell, 17 Mont. 67, 42 Pac. 100; Skinner v. Wilhelm, 63 Mich. 568, 30 N. W. 311; State ex rel. Stearns v. Corner, 22 Neb. 265, 3 Am. St. Rep. 267, 34 N. W. 499; State v. Wright, 14 Or. 365, 12 Pac. 708; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; State v. Silver, 9 Nev. 227; Clark v. Wallace County, 54 Kan. 634, 39 Pac. 225.

*Geo. M. Gannon*, State's Attorney, *W. S. Lauder*, and *Wishek & Shubeck*, for respondent.

Bastardy proceeding is neither civil nor criminal, but partakes of the character of both. *Re Lee*, 41 Kan. 318, 21 Pac. 282; *State v. Scott*, 7 S. D. 619, 65 N. W. 31; *Clark v. Carey*, 41 Neb. 780, 60 N. W. 78, 9 Am. Crim. Rep. 117; *State v. Lang*, 19 N. D. 679, 125 N. W. 558.

A preponderance of the evidence is all that is necessary to entitle plaintiff to a verdict. *State v. Bunker*, 7 S. D. 639, 65 N. W. 33; *State v. Knutson*, 18 S. D. 444, 101 N. W. 33; 5 Cyc. Law & Proc. p. 664.

If the subject of a refused instruction is covered by the general charge, it is not error to refuse the request. *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. McGahey*, 3 N. D. 293, 55 N. W. 753; *Daeley Bros. v. Minneapolis & N. Elevator Co.* 4 N. D. 269, 60 N. W. 59; *Smith v. Hawley*, 14 S. D. 638, 86 N. W. 652; *Young v. Harris*, 4 Dak. 367, 32 N. W. 97; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *Perin v. Parker*, 126 Ill. 201, 2 L.R.A. 336, 9 Am. St. Rep. 571, 18 N. E. 747; *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. 573; *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484; 1 Blashfield, Instructions to Juries, § 152, and note 148.

BURKE, J. In the district court the defendant was adjudged to be the father of a certain bastard child, and, feeling aggrieved by such adjudication, he has appealed to this court.

His first contention is that there is no bastardy law in effect in this



state; that chapter 5 of the Code of Criminal Procedure, enacted in 1895, is unconstitutional and void because enacted under the general title of the Code of Criminal Procedure, when in truth and in fact the said chapter relates wholly to civil procedure, thus violating § 61 of our state Constitution. In his brief the defendant concedes that the said Code of Criminal Procedure, excepting said chapter 5, is constitutional and valid, so we may confine our inquiry to the single question, does its title, "An Act to Establish a Code of Criminal Procedure for the State of North Dakota," correctly describe and entitle our bastardy law; or, conversely stated, is our present bastardy law germane to and embraced in the aforesaid title? The general object of bastardy laws is to compel the putative father to help support his child and to protect the community from the burden that might otherwise fall upon it. See 5 Cyc. Law & Proc. p. 645, and cases cited. Some states believe this object best obtained by allowing the mother to bring a civil suit against the father; other states try to accomplish the same result by establishing criminal proceedings against the father. In the first-named states the legislative acts belong in the Code of Civil Procedure; in the latter states such laws belong in the Code of Criminal Procedure. It is only necessary to examine our statutes to determine to which class of states North Dakota belongs. Our bastardy law provides that the mother shall make a criminal complaint before a justice of the peace, in which she asks that the father be arrested. The state's attorney of the county must prosecute; the proceedings are entitled in the name of the state; the defendant is arrested at public expense, and in lieu of bail is confined. If he is adjudged to be the father of the child, and fails to obey the final order of the court, he is committed to jail. As Judge Carmody says in the case of *State v. Lang*, 19 N. D. 679, 125 N. W. 558: "Instead of beginning the action by the issuance of a summons, as in civil cases, a criminal proceeding is employed." The proceedings are quasi criminal at least. The case of *State v. Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375, cited and relied upon by the defendant, does not apply to North Dakota. The legislature of the state of Washington had enacted a criminal code containing a bastardy law, but their bastardy law provides only a civil remedy. There was no provision for a criminal complaint nor for a warrant nor for an arrest nor for a fine nor for imprisonment of any kind. Their supreme court points out those facts,

and holds that their bastardy law was a civil proceeding and belonged in their Civil Code. We therefore conclude and hold that our bastardy law was properly included in the act of Criminal Procedure, and is constitutional and valid.

The second grievance of the defendant relates to rulings of the trial court in admitting and excluding evidence. Most of those objections were aimed at leading questions asked by the state's attorney when examining the complainant. The record discloses that she was unable to give her testimony in the English language, and was being examined, through an interpreter, relative to acts of illicit intercourse; she was but eighteen years of age, and had given birth to her first child but three weeks before the trial. We are not surprised that the state's attorney was obliged to use leading questions. Under some circumstances leading questions are not only permissible, but proper, and a wide discretion is therefore vested in the trial judge. A careful examination of all of the questions objected to upon this ground satisfies us that the state's attorney did not abuse his privilege, and the rulings of the trial court in that respect were correct. During the said examination the state's attorney asked the complainant the following question, "Did you say to Mrs. Brandner in her house, before Brandner came in, that you had had intercourse with Mr. Brandner before February 10th?" (Objected to as leading, suggestive, calling for a conclusion of witness and cross-examination of his own witness.) Overruled. The defendant now says there is no legal justification for overruling this objection, that the hearsay character of the question is shown on the face thereof. It will be noted that at the time the question was asked no objection was made on the ground that it was hearsay. This convinces us that the objecting counsel did not then notice the hearsay feature of the question, but discovered it after he had obtained the transcript of the evidence in the case. If the hearsay feature of the question was not prejudicial enough to attract his attention at the trial, he cannot expect us to notice it upon appeal. Objections to questions made at the trial should be taken with the idea of aiding the trial court, not in confusing him. Another question objected to was asked the defendant upon cross-examination by the state's attorney, as to whether or not he had been accused of the parentage of the child by the complainant's parents. The state was trying to impeach the testimony of the defendant at the time, and we think the question entirely proper. To-

ward the close of the trial, the state recalled one of its witnesses to clear up some of his testimony, and, while on the stand, he reiterated a small part of the testimony that he had previously given. This is objected to by the defendant as repetition. If that was not entirely proper, it is, as least, not prejudicial enough to justify a reversal.

The third and fourth grounds relied upon by the defendant for a reversal is the giving of certain instructions to the jury by the trial judge and his refusal to give certain requested instructions for the defendant. The instructions given and the requests made are too lengthy to be set forth in this opinion, especially as there is but one point involved. The defendant's claim is stated by him in his brief as follows: "If this is a criminal proceeding, and the law properly embraced in the Code of Criminal Procedure, then there can be no doubt that these two requests should have been given. If the defendant was being proceeded against for a crime, under laws dealing with that subject, then, in spite of any statutory provision that the Code of Civil Procedure shall govern, the defendant had the constitutional right, which the legislature could not take away, to the benefit of the presumption of innocence." "We do not contend that the proceeding is a criminal one. We have simply placed ourselves in the position that if the law be upheld, as pertaining to crime, then the instructions asked were proper, and those given relative to preponderance of evidence, erroneous. The legislature has no power to provide that a preponderance of evidence shall be sufficient upon the trial of any criminal action or proceeding. Nothing short of proof beyond a reasonable doubt will suffice, under our Constitution. These requests were made on the theory that if the proceeding was authorized by law, at all, it was a criminal proceeding, necessarily, and the rules stated were the right ones in such case." In other words, the defendant contends that, if the law is constitutional, the trial should be governed by the rules governing a criminal trial. This contention is clearly wrong. Our Code especially states that the trial shall be governed by the laws regulating civil actions. Section 9653, Revised Codes of North Dakota 1905. The defendant was not being prosecuted for a crime. A quasi criminal action had been brought against him to compel him to aid in the support of a child alleged to be begotten by him, and the proceedings were generally criminal, but the trial itself should be governed by the rules governing civil trials. The legislature has full power to make such

regulations. 5 Cyc. Law & Proc. p. 664, and cases cited. Also see § 64, vol. 3, Decen. Dig. and cases cited. During the trial and while the complaining witness was being cross-examined by the defendant's counsel, the complaint in the action was offered in evidence by the defendant for the purpose of impeaching her testimony. The offer was general and the complaint was received in evidence. At the close of the trial the defendant requested the trial court to instruct the jury that the complaint was not a part of the evidence, and could not be considered by the jury as any part of the charge thereby made or any evidence against the defendant. This instruction was refused by the trial judge and properly so. Indeed the trial court could not have given the requested instructions without telling the jury something that was not true; to wit, that the complaint was not in evidence.

The fifth ground advanced by the defendant is that the evidence was not sufficient to sustain the verdict of guilty. The defendant's counsel has made an able argument and pointed out discrepancies in the testimony of the complainant, among the most serious of which is the fact that she first accused the defendant of having but one act of intercourse with her and that upon February 10th, 1908; and that after the child was born, September 19, 1908, she accused the defendant of but two acts of intercourse,—the first being on December 29th, 1907, and the second, February 10th, 1908. It was the duty of the jury to reconcile the testimony of the various witnesses, and from all of the testimony in the case arrive at what they believed to be the truth. They were not obliged to believe all of the testimony of the complainant nor to disregard it *in toto*. If they believed that certain portions of her testimony were truthful and certain portions untruthful, it was their duty to find the facts truthfully stated and reject the facts untruthfully stated. They may have found in this case that the criminal intimacy had begun prior to the time testified to by the complainant. That she should have attempted to minimize her offense is but natural. In addition to the direct and positive accusation of the complainant, there is in the evidence many corroborating circumstances tending to support the verdict. During December, 1907, the complainant was staying at the home of the defendant, sleeping under the same roof. At that time the defendant's wife was about to give birth to a child. It was not shown that the girl had a lover or even male company during that period. In our opinion the evidence is amply sufficient to support the verdict.

Sixth. The defendant made a motion for a new trial, alleging, among other grounds, the discovery of new evidence. We have examined the same and find it cumulative only. The trial court did not abuse his discretion in refusing to grant a new trial upon this last ground. A careful examination of the record in the entire case convinces us that the defendant has had a fair trial, and the judgment is accordingly affirmed.

All concur, except MORGAN, Ch. J., not participating.

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C. B. YOUNGMAN v. FREDERICK E. SALVAGE.

(130 N. W. 930.)

**Bankruptcy — Discharge — Effect of Second Bankruptcy Discharge on Former Discharge.**

A refusal of a discharge in bankruptcy is *res judicata* as to the right to discharge as to all claims scheduled and provable against the estate of the bankrupt. But where several years later second proceedings in bankruptcy are instituted by such bankrupt, and such claims are therein scheduled, it is the duty of the creditor who desires to rely on such former adjudication to plead the same, or otherwise call it to the attention of the bankruptcy court; and if he fails to do so, and a general discharge is granted in the second proceedings, the state court must give effect thereto in any proceeding thereafter brought to enforce the payment of such claim.

Opinion filed March 13, 1911.

Appeal from District Court, Cass county; *Charles A. Pollock*, Judge. Action by C. B. Youngman against Frederick E. Salvage. From a certain order, plaintiff appeals.

Affirmed.

*Robert M. Pollock* and *L. L. Twichell*, for appellant.

The effect of a discharge in bankruptcy is determinable by the proper tribunal before which collection of a debt is sought. *Re McCarty*, 111 Fed. 151; *Re Marshall Paper Co.* 43 C. C. A. 38, 102 Fed. 872; *Re Thomas*, 92 Fed. 913; *Re Claff*, 111 Fed. 506; *Re Rhutassel*, 96 Fed. 597; *Re Mussey*, 99 Fed. 71.

Discharge or refusal of discharge in one proceeding in bankruptcy

is *res judicata* as to a second proceeding, the claimant not having appeared in the latter. *Re Claff*, 111 Fed. 506; *Kuntz v. Young*, 65 C. C. A. 477, 131 Fed. 719; *Gilbert v. Hebard*, 8 Met. 131; *Re Bramlett*, 161 Fed. 588; *Re Kuffler*, 80 C. C. A. 508, 151 Fed. 12.

*Engerud, Holt, & Frame*, for respondent.

Order of discharge clears the bankrupt from all provable debts, whether proved or not. Section 17, bankruptcy act; *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9.

A discharge is from all debts not excepted by the bankruptcy act, and includes no other. *Re United Button Co.* 140 Fed. 501; *United States ex rel. Adler v. Hammond*, 44 C. C. A. 229, 104 Fed. 862; *Crawford v. Burke*, *supra*.

The lower court was wrong in holding bankrupt entitled to discharge in second proceeding in bankruptcy, and leaving its effect on debts proved under the first to be determined in subsequent proceedings in other courts. *Gilbert v. Hebard*, 8 Met. 129; *Fisher v. Currier*, 7 Met. 424; *Kuntz v. Young*, 65 C. C. A. 477, 131 Fed. 719; *Re Drisko*, 2 Low. Dec. 430, Fed. Cas. No. 4,090; *Re Kuffler*, 80 C. C. A. 508, 151 Fed. 12; *Re Fiegenbaum*, 57 C. C. A. 409, 121 Fed. 69; *Re Bramlett*, 161 Fed. 588.

**FISK, J.** The facts necessary to an understanding of the question involved on this appeal are not in dispute, and briefly stated are as follows:

In April, 1900, appellant duly recovered a judgment against respondent in a justice court of Cass county for the sum of \$206.80, which judgment was thereafter, and on July 5, 1900, duly transcribed and docketed in the office of the clerk of the district court of such county, where it still remains unsatisfied of record. In January, 1902, respondent filed in the office of the clerk of the United States district court in and for the district of North Dakota his petition in due form, praying to be adjudged a bankrupt, and at the same time filed with such clerk in due form his schedule of assets and liabilities, and among the liabilities thus scheduled was the judgment aforesaid. In due time said court made its order and judgment that the petition of respondent praying for a discharge from his debts and liabilities be denied, and such discharge as a bankrupt refused for reasons stated.

In May, 1906, respondent filed his second petition in such court,

praying to be adjudged a bankrupt, and also at such time filed his schedule of assets and liabilities as required by law, including in such schedule the judgment aforesaid. Appellant did not prove his said claim nor present the same in such second bankruptcy proceedings, nor did he take any part therein whatsoever. Thereafter, and on July 30, 1906, the said district court of the United States in due form made its order and judgment, wherein it adjudged that respondent be discharged from all debts and claims which were made provable by the bankruptcy acts of the United States, existing at the date of filing such second petition in bankruptcy, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

Thereafter, and in the month of September, 1909, appellant caused execution to issue on such judgment, under which execution the sheriff levied upon certain real property of respondent's. Thereupon the district court of Cass county, on application of respondent, and on due notice to appellant, made its order to the effect that the discharge in bankruptcy secured as aforesaid operated to discharge respondent from liability on account of such judgment.

This appeal is from the order thus made, and the sole question for determination is the correctness thereof.

Appellant's contention, in brief, is that the right of the bankrupt to be discharged from such debt was fully adjudicated in the first bankruptcy proceedings, and that the judgment therein denying such discharge is *res judicata*, and that appellant may, in this proceeding, urge such former adjudication in bar of respondent's claim that he was discharged from such debt by the adjudication in such second bankruptcy proceedings. In other words, it is his contention that the judgment in question was, in legal operation, excepted from the discharge in the second bankruptcy proceedings, although such debt is not included within the debts expressly excepted from such discharge under the provisions of § 17 of the bankruptcy act. (Act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3428.)

Counsel for appellant concede that the form of discharge in the second bankruptcy proceedings is the one prescribed by the Supreme Court of the United States, and that the debt represented by appellant's judgment is not expressly excepted under the provisions of the discharge, nor does it fall within the debts excepted from such discharge under the provisions of § 17 of the bankruptcy act aforesaid. Counsel

for appellant very properly assert that the right to a discharge and the effect of a discharge are wholly distinct propositions, and, as was held by the court in *Re Marshall Paper Co.* 43 C. C. A. 38, 102 Fed. S72: "The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defense to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge." In other words, the power rests with the bankruptcy court to determine the right to a discharge, but the court whose jurisdiction is invoked for the collection and enforcement of a debt claimed to have been discharged possesses the exclusive right to determine the effect of such discharge. This being true, it logically follows that the plea of former adjudication should have been interposed in the second proceedings in the bankruptcy court, that court have the sole jurisdiction to determine such question. Manifestly, the state court has no jurisdiction to determine the right to such discharge, and consequently cannot determine the question of former adjudication. Being restricted to the right to determine the effect of such discharge, the state court must look alone to the judgment of discharge in the bankruptcy court, and give effect thereto according to the plain provisions of the bankruptcy act.

As before stated, the discharge is in the form prescribed by the Supreme Court of the United States, and is as follows:

"Whereas, Frederick E. Salvage, of Wheatland, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Frederick E. Salvage be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 9th day of May, 1909, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." The language of such order is very explicit and susceptible of but one meaning. It discharges respondent from all debts and claims which are provable by the bankruptcy acts against his estate, existing at the date the petition in bankruptcy was filed, and excepting only such debts as are by law excepted from the operation of a discharge in bankruptcy. That the debt represented by the judgment in question was provable in the



second bankruptcy proceedings is not controverted by appellant, nor is such fact open to question under the provisions of § 63-A-1, bankruptcy act. Being a provable claim, is it such a debt as is excepted by law from the operation of the discharge? Section 17 of the bankruptcy act is clear and specific, and enumerates the only provable debts which are excepted from such discharge, as follows: Such as,

1. Are due as a tax. . . .

2. Are liabilities for obtaining property by false representations, or wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female, or for criminal conversation;

3. Have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

4. Were created by his fraud, embezzlement, misappropriations, or defalcations, while acting as an officer or in a fiduciary capacity.

It is not contended that the debt in question falls within any of the above enumerated exceptions, but counsel for appellant contend, in effect, that there should be added to the above statutory exceptions, claims presented in prior bankruptcy proceedings regarding which the bankruptcy court has refused to grant the debtor a discharge. In other words, they argue that under the doctrine of *res judicata*, such claim is by law excepted from the operation of the discharge. The fallacy of such contention is apparent. As before stated, appellant is seeking to urge such doctrine of former adjudication in the wrong tribunal.

As lending support to our views, see 2 Remington on Bankruptcy, §§ 2438, 2664, 2666, 2680; 3 Id. § 2438; Bluthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192, affirming 51 Fla. 396, 13 L.R.A.(N.S.) 629, 120 Am. St. Rep. 181, 41 So. 533; Pollet v. Cosel, 30 L.R.A.(N.S.) 1164, 179 Fed. 488, 103 C. C. A. 68, Re Kuffler, 80 C. C. A. 508, 151 Fed. 12; Kuntz v. Young, 65 C. C. A. 477, 131 Fed. 719; Dean v. Boston Municipal Ct. Justices, 173 Mass. 453, 53 N. E. 893.

Mr. Remington in his valuable treatise above cited makes a very clear and correct statement of the rule as follows:

"Where the debts in the subsequent bankruptcy are in part the  
21 N. D.—21.

same as in the first bankruptcy, and in part are different, a difficult question arises as to the operation of the refusal of the discharge in the first proceedings. The bankrupt undoubtedly has a right to apply for discharge from the new debts, and the new creditors may have no ground for barring him therefrom. But should the exercise of that right entail upon the old creditors a relitigation of the entire subject of discharge? The former refusal of discharge is not available as a statutory bar to the new discharge, for it is only the granting of a discharge (and in voluntary proceedings within six years) that is a bar. Moreover, the acts which barred the first discharge were committed in another bankruptcy than the present, and probable are not urgeable in the present bankruptcy. At the same time, the debts of the old creditors are still 'provable' in the second bankruptcy, and hence are dischargeable thereby. What, then, is the course to be pursued? There are two possible courses open. Either the old creditor may urge *res judicata* in reply to the bankrupt's defense of discharge when the old creditor resorts to legal proceedings to enforce his claim against the bankrupt; in which event, however, it might rightly be contended that the debt was provable in the second bankruptcy, and was not one of those excepted from the operation of discharge, and hence was discharged by the second bankruptcy, even if not by the first bankruptcy.

"Or, on the other hand, the court, in its order of discharge in the second bankruptcy, might expressly except all debts provable in the first bankruptcy wherein discharge had been refused, although, to be sure, power to make exceptions in orders of discharge is doubtful.

"The latter seems to be the proper course; for the defense is the defense of *res judicata* as to the right to a discharge itself, and not as to the dischargeability of the particular debt. Were the debt not provable, or were it one of those excepted from the operation of discharge by § 17 of the act, it would be proper to wait until it was sought to enforce the debt, then to urge that it was not within those debts enumerated as dischargeable; but, on the contrary, it is in fact provable, and was not excepted, and therefore is discharged unless the decree of discharge itself is limited." 2 Remington, Bankruptcy, § 2438.

"The decree of discharge should be general, and should not attempt to limit its effect by excepting particular debts excepted by statute from the operation of discharge; but where the right itself to a discharge

has already been denied in a former bankruptcy, the discharge decree may except the old debts, because of *res judicata*." Id. § 2664.

"Nevertheless, where it is not the effect of a discharge on a particular debt that is involved, but rather the right itself to a discharge, and where such right exists as to some creditors, and not as to others, as in cases of former denial of discharge, the court undoubtedly may give effect to the *res judicata* by excepting debts provable under the former bankruptcy. Otherwise such debts, being likewise provable under the present bankruptcy, would be discharged by the present discharge, and the former adjudication be defeated." Id. § 2666

"It has been held that the refusal of a discharge is *res judicata* as to all provable claims under the bankruptcy; and that subsequent new proceedings in bankruptcy do not affect them.

"But while it is true that the former refusal is *res judicata*, yet it is *res judicata* as to the right to discharge, rather than as to the dischargeability of the particular debt, and so a defense to the petition for discharge, rather than an exception to be pleaded after the discharge has been granted. The question is: 'Has the bankrupt a right to renew his application for a discharge from the old debts whose discharge has once been denied?' rather than, 'Does the new discharge make exception of these still provable debts?' It would seem perilous, indeed, for the creditors under the old bankruptcy to permit a later general decree of discharge to be entered in the new proceedings, and to rely then upon a *res judicata* which was never presented as a bar to the petition itself." Id. § 2680.

And in volume 3 it is said: "If the creditor takes no steps to have the discharge decree provide for an exception of his claim, he will be bound and the debt be discharged."

The foregoing views are fully supported by the United States Supreme Court in the recent case of *Bluthenthal v. Jones*, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192. Among other things the court holds that it is the duty of the creditor who relies upon the former adjudication to plead the same, or in some manner bring it to the attention of the court in the second bankruptcy proceedings, and that where he fails to do so, and a general discharge is granted, such creditor's claim is barred thereby.

We are forced to the conclusion that the discharge, being general in its terms, operated to release respondent from liability under such judg-

ment, and hence the order appealed from was correct, and the same is accordingly affirmed.

All concur, except MORGAN, Ch. J., not participating.

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THE STATE OF NORTH DAKOTA EX REL. ANDREW MILLER, Attorney General of the State of North Dakota, v. ALEXANDER MILLER, Fritz Giffey, Ed. Hanlon, M. F. Minehan, J. J. Behles, F. E. Wright, and Herbert F. O'Hare.

(131 N. W. 282.)

**Supreme Court — Original Jurisdiction — Organization of New Counties.**

1. The supreme court, in the exercise of its original jurisdiction, will, under the facts alleged in the petition, and on the application of the attorney general in the name of the state, issue its prerogative writ to enjoin an alleged new county and those assuming to act as its officers, from exercising jurisdiction over the territory embraced within such new county, until the district court, in which is pending a proceeding to determine the validity of the election at which the proposition was submitted for the organization of such county, has finally adjudicated such question.

**Counties — Creation of New Counties.**

2. The issue as to the validity of such election having been duly submitted to the courts for adjudication, it is a legal fraud upon the people who are interested in defeating the organization of such proposed new county, and who are consequently the real parties in interest, for the county auditor, a mere nominal party, to end such litigation in effect by the issuance of his certificate to the secretary of state as provided by § 2330, Rev. Code 1905, his right to issue such certificate being dependent upon the validity of such election.

**County Division.**

3. Certain language in the opinion in State ex rel. Minehan v. Meyers, 19 N. D. 804, 124 N. W. 701, wherein it was held that a four weeks' publication of notice of the submission of a county division proposition is essential, was inadvertently used, and the same is disapproved.

Opinion filed March 17, 1911.

Application for injunction by the State on the relation of Andrew Miller, Attorney General, against Alexander Miller and others. On motion to quash the order to show cause.

Motion denied.

*Andrew Miller, Attorney General, J. E. Nelson, State's Attorney, W. P. Costello, and Engerud, Holt, & Frame, of counsel, for plaintiff.*

*Herbert F. O'Hare, George A. Bangs, and George R. Robbins, for defendants.*

FISK, J. On February 18th the attorney general, in the name of the state, filed in this court a petition praying for the issuance by this court of its prerogative writ of injunction restraining and enjoining defendants, who claim to be duly appointed and qualified officers of the alleged new county of Stevenson, from proceeding or attempting to proceed in the organization of such alleged new county, and from in any manner hindering, preventing, or interfering with the exercise by McLean county and its tribunals and officers, of jurisdiction over the territory, inhabitants, and property within the boundaries of the pretended new county aforesaid.

On filing such petition, an order was issued requiring defendants to show cause, if any there be, why the prayer of such petition should not be granted, and in such order defendants were restrained from committing any of the acts sought to be enjoined during the pendency of such proceedings. On the return of such order to show cause, defendants appeared and moved to quash such order to show cause upon the grounds: (1) That the facts set forth in the petition do not afford ground for the exercise by this court of its original jurisdiction; (2) that the facts set forth therein are insufficient to afford equitable relief; (3) that there is no equity in such petition; and (4) that the facts set forth are insufficient to justify the issuance by this court of its prerogative writ of injunction.

The facts alleged in such petition being admitted for the purpose of determining such motion to quash, we deem it advisable to set forth such petition *in extenso*, that a full understanding thereof may be had. Omitting formal parts and the prayer for relief, such petition is as follows:

"Comes now Andrew Miller, the attorney general of the state of North Dakota, and respectfully shows to the court and alleges:

I.

"That he is the duly elected, qualified, and acting attorney general of said state, and brings this action in the name of said state and in its behalf.

## II.

"That some time prior, to November, 1908, general election in this state, there was presented to the board of county commissioners of the county of McLean a petition for the submission to the voters of said county at said 1908 general election of the question of changing the boundaries of McLean county by segregating and creating out of part of said county a new county, to be known as Stevenson, the boundaries of which are specifically set forth and described in the copy of the ballot used at said election, which is hereto attached and marked 'Exhibit A;' the said Stevenson county proposition being thereon set forth at the top of the said 'Exhibit A,' and is hereby referred to for the sake of brevity.

"That the prayer of said petition was granted by said board of county commissioners, and thereafter there was prepared by the county auditor of said county a ballot in the form of 'Exhibit A' hereto attached, and the same was furnished to each of the voting precincts of said McLean county to be used by the electors desiring to vote on said proposition, and said ballot also contained two other county division propositions, as shown on said ballot, which had been and were also submitted to the electors at said election.

## III.

"That no notice of the election upon said question of changing the boundaries of said county, as aforesaid, was given to the people of said county in the manner or form required by law, or at all, save and except that a statement that such proposition would be submitted to the voters of said county at the November 1908 election was published in three of the official newspapers of said county, once in each week during the two weeks next preceding the election, which statement was so published by including the same in and as a part of the notice of the primary election nominations of candidates to be voted for at said general election. That said notice was wholly insufficient, and, although there were at said election 3,600 electors who voted at said election in said county, there were cast less than 1,900 votes pro and con upon said proposition to create the said county of Stevenson. And plaintiff alleges that there was not a full or fair expression of the will of the voters upon said proposition.

## IV.

"That the understanding and opinion prevailed generally through-

out the county of McLean amongst the voters who knew of and were interested in said propositions to divide the county at said election, that, in order to adopt such proposition, the same would have to receive a majority of all the votes cast by electors who exercised their right to vote at said general election, and that an omission to vote on such proposition was equivalent to a vote against the same; and misleading and erroneous literature was circulated among the voters, which incorrectly stated the boundaries of the proposed new counties, and also set forth and stated that a proposition to divide the county could not be adopted unless it received the affirmative vote of a majority of the electors who voted at the general election; and a large portion, to wit, at least 30 per cent of the electors who voted at said general election, were misled and misinformed with respect to the manner of voting upon said proposition, and particularly were misinformed and misled as to the effect of failing to vote in the negative thereon, and, by reason thereof, at least 30 per cent of the electors of said county who voted at said election were induced to fail to vote in the negative on said Stevenson county proposition, who intended to do so, and in good faith believed they had done so.

#### V.

"That the aggregate number of electors in said McLean county who voted the county division ballots was more than 2,800, and nearly three thousand, but of this number only 1,008 appear upon the returns to have voted in favor of the creation of Stevenson county, and all voted against the same, as appears from the face of the returns.

#### VI.

"That all the precincts of said McLean county did not make any returns to the county canvassing board of the vote upon said division propositions, or any of them. That said precincts so failing to make any returns of said vote were the precincts of Butte, Douglas, Roseglen, Whittaker, Shell Creek, and Turtle Lake, and the aggregate number of electors who voted in said precincts above named at said general election was 384, of whom, as plaintiff is informed and believes, more than 150 voted the county division ballot; but plaintiff has no information as to the number of votes for and against said respective proposition. That the county canvassing board abstracted and counted the votes and certified to the returns to the extent of the precincts which made such returns, but did not send for, or cause to be

procured, the returns from the precincts above named, which omitted to send in the returns, and in that way announced and declared upon such incomplete canvass that there were 1,006 votes for Stevenson county and 811 against the same.

#### VII.

"That said county canvassing board counted and included in said 1,006 affirmative votes for Stevenson county at least 200 votes which were null and void, in this, that each of the 200 voters whose votes were by the precinct election officers counted and returned as votes in favor of Stevenson county had on the same ballot voted in favor of the second proposition, which appears on 'Exhibit A,' as well as in favor of Stevenson county, although said second proposition was in conflict with the proposition to create Stevenson county, in this, that the territory proposed to be created into said respective new counties in said two propositions was in part the same. That said void and conflicting votes so counted and returned as aforesaid were cast in the following precincts to the number set opposite the name of each precinct: *viz.*,

Lincoln.....9	St. Mary....20
Curtis.....8	Lamont.....5
Malcolm.....4	Goodrich....30
Garrison....80	Mercer.....10

And there were like conflicting votes counted in many other precincts of said county.

#### VIII.

"That, on account of the foregoing facts and others, the then county auditor of McLean county refused to certify the result of said election on said Stevenson county to the secretary of state; he being of the opinion that said election was void, and that said proposition to create Stevenson county had not been carried. That, thereupon, on or about the 19th day of March, 1909, M. F. Minehan, who is one of the defendants in this action, commenced a proceeding in the district court in and for McLean county, North Dakota, wherein the state of North Dakota, on the relation of said Minehan, was plaintiff, and Ole B. Wing, as county auditor of McLean county, was defendant, in which he alleged in substance that the proposition to create Stevenson county had been duly submitted to the electors of McLean county at said gen-



eral election, and had been adopted, and sought to obtain from the said court in said proceeding a peremptory writ of mandamus, compelling said county auditor to certify the result of said election to the secretary of state, to the end that said county of Stevenson might be organized. That said defendant in said proceeding thereupon made answer therein setting forth and alleging all the facts hereinbefore set forth and alleged, and other facts, and asserted and contended that said election was void, and that said proposition to create the county of Stevenson had not been adopted, and that he, said defendant, ought not to certify the result of said election to the secretary of state, and prayed that the court dismiss said proceeding on the merits, and hold and adjudge that said election was void, and that said proposition to create Stevenson county had not been adopted. That thereupon such proceedings were had, that the district court in said proceeding struck out all said defensive matter from said answer, and ordered and entered judgment awarding a peremptory writ of mandamus, commanding said Ole B. Wing, as county auditor, to certify the result of said election to the secretary of state. That thereupon an appeal was duly taken by the said defendant to the supreme court of the state of North Dakota from said order and judgment of the district court, and such proceedings were thereupon had on said appeal that the supreme court held and decided and ordered that the order and judgment of the district court be reversed and vacated, and that the defensive matter set forth in said defendant's answer, and which is set forth in this complaint in substance and effect as set forth in said answer, constituted a complete defense in said mandamus proceeding, and would, if proved, establish the invalidity of said election. That said decision and order of the supreme court was thereupon remanded and transmitted to the district court on or about the 8th day of February, 1910, and said decision of the supreme court, and the mandate thereof, ordered and directed that the district court proceed to the trial of said mandamus proceeding. That said mandamus proceeding, ever since that time, has been and is still pending and undetermined in the district court, and, although duly noticed for trial, has not yet been heard and determined.

#### IX.

"That during the pendency of said mandamus proceeding, the term of office of Ole B. Wing as county auditor of McLean county expired, and thereupon Paul S. Meyer, who was the successor in office of said

Ole B. Wing, was duly substituted for said Ole B. Wing as defendant in said proceeding.

### X.

"That although said Ole B. Wing, and subsequently Paul S. Meyer, as such successive county auditor, were the nominal defendants in said mandamus proceedings, in truth and in fact the real defendant was McLean county and sundry and numerous citizens and taxpayers of said McLean county, who, in the name of said county auditor, maintained and prosecuted the defense of said proceedings for the purpose of obtaining the relief sought by the answer therein, to the effect that said pretended election for the organization of Stevenson county be held null and void.

### XI.

"That, notwithstanding all the foregoing facts, the said Paul S. Meyer, as county auditor of McLean county, did, on or about the 11th day of February, 1911, wrongfully and unlawfully, of his own volition, in disregard of the pendency of said mandamus proceeding, and in contempt of the court, surreptitiously execute a certificate, as county auditor of McLean county, wherein he falsely certified to the secretary of state in effect that the proposition to create the county of Stevenson had been duly submitted to the electors of McLean county at the November, 1908, election, and had been duly adopted by a majority vote, and thereupon the like fact was certified by the secretary of state to the governor thereof, and the governor thereupon named the defendants Alexander Miller, Fritz Giffey, and Ed. Hanlon to be the county commissioners for the said pretended county of Stevenson.

### XII.

"That thereupon said three pretended commissioners pretended to qualify as such, and have or are about to name and appoint M. F. Minehan as county auditor of said pretended county, J. I. Behles as county treasurer thereof, F. E. Wright as state's attorney thereof, and Herbert F. O'Hare as county judge. That plaintiff is informed and believes that said defendants are now claiming and asserting that said county of Stevenson has been duly created and organized, and that they are the officers thereof, holding the respective offices above named, for which they claim to have been appointed as above set forth, and that they intend to and will, unless enjoined from so doing, proceed to assert and execute their pretended power and jurisdiction as

such officers of said pretended county of Stevenson, and intend to and will, unless restrained from so doing, effect a complete organization of said pretended county of Stevenson, and proceed to exercise all the powers and functions of a duly organized county of the state over and through all that territory within the county of McLean, comprised within the boundaries proposed for said county of Stevenson, as set forth in 'Exhibit A,' and intend to and will prevent or attempt to prevent the county of McLean and its several officers and tribunals from exercising their appropriate powers and duties in said territory, and intend to and will levy or attempt to levy taxes upon the inhabitants and property within said territory, which they claim constitutes the county of Stevenson, and intend to and will contract or attempt to contract obligations and indebtedness for and in the name of said pretended county of Stevenson, and hinder and prevent the county of McLean and its officers from exercising and enforcing their jurisdiction and the laws of the state within said territory. That unless the unlawful, collusive, and contemptuous proceedings of said defendants aforesaid are forthwith enjoined and restrained, the public business throughout the county of McLean and in the territory of the pretended Stevenson county will be seriously and irretrievably disturbed and interfered with, to the great detriment of the peace and good order of the state at large and of the inhabitants of McLean county, and a great multiplicity of suits will result, and irreparable mischief.

### XIII.

"That each and all of the said defendants, long before undertaking the aforesaid collusive proceedings, well knew all the facts here set forth.

### XIV.

"That an application for the relief herein prayed for was made to the district court of the sixth judicial district on this day, and the facts herein alleged were duly presented to it, but said court denied said application and declined to entertain jurisdiction thereof. And forasmuch as the plaintiff has no other speedy and adequate remedy in the premises, and the rights and sovereignty of the state of North Dakota are being impeded, infringed, and jeopardized, and the peace and good order of the inhabitants thereof, and of the inhabitants of

McLean county, are greatly endangered, disturbed, and put in confusion, your relator respectfully prays, etc.”

Petitioner's contention, briefly stated, is that the certificate issued and transmitted by the county auditor of McLean county to the secretary of state was a nullity, for the reason that the facts thus certified to were in litigation and undetermined in the mandamus proceeding, in which proceeding such auditor was and is a mere nominal party; McLean county and its citizens who are opposed to the organization of such new county being the real parties in interest. Hence, such nominal party was powerless to take any action inimical to the rights of such real parties in interest. In other words they invoke the doctrine announced by this court in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866. It is, in effect, contended that the act of such auditor in issuing such certificate was tantamount to a revocation of his original decision, and an assumption on his part of the right to supplant the jurisdiction of the district court by deciding the very question in litigation in that court, and that a mere nominal party has no such power. We think petitioner's contention in this respect is sound and unanswerable. Were it otherwise, a mere nominal party would have the power to ignore at will the rights of the real parties in interest by usurping the jurisdiction of the tribunal to whom the issues in controversy have been submitted for decision, and in effect end the litigation at his mere whim or caprice. Such is clearly not the law, as we have expressly decided in the *Schouweiler Case*.

In determining the question of the sufficiency of the petition to afford the relief prayed for, we shall therefore assume that the certificate of the county auditor to the secretary of state was issued wholly without authority of law, in view of the pending litigation in the mandamus proceeding, and is consequently a nullity. In the light of this conclusion, do the facts alleged in the petition warrant this court in issuing its prerogative writ of injunction for the purpose of preserving *in statu quo* the rights of all parties concerned until the determination of the proceedings in the mandamus action?

Pursuant to such wrongful and illegal certificate, regular on its face, the governor, pursuant to law, appointed three commissioners for such new county, who have assumed to qualify and have taken the preliminary steps requisite to the organization of such new county, and have appointed, or are about to appoint, a full set of officers, and such com-

missioners and other officers are assuming, in behalf of such county, to exercise jurisdiction over the territory embraced within its limits. We are therefore confronted with the serious situation of a conflict between two counties (one a *de jure*, and the other a *de facto*, organization) and their officers in the exercise of jurisdiction over the same territory. It goes without saying that, unless the relief prayed for is granted, grave complications will inevitably arise, resulting in a chaotic situation in governmental affairs in that portion of the state, necessarily resulting in a multiplicity of suits, and manifestly operating to directly affect the state at large in the exercise of its sovereignty, franchises, and prerogatives. That such a condition of affairs presents a proper case for the issuance by this court of its writ of injunction would seem clear. See *Ewing v. Thompson*, 43 Pa. 372; *Kerr v. Trego*, 47 Pa. 292; *Pittsburg's Appeal*, 79 Pa. 317.

In the light of the facts presented in the petition, we know of no other speedy or adequate remedy afforded petitioners for preventing the confusion and complications which will inevitably result on account of the conflict of authority between these parties. Until the validity of the election is regularly and finally determined by the district court in the pending mandamus proceeding, the public interests demand that the *status quo* should be maintained. The question of the legal right to organize the proposed new county of Stevenson is directly involved in such pending litigation, and until such question is judicially settled, the courts should not permit defendants to entangle public business, and thereby jeopardize the rights both of the public and of individual citizens. *Parsons v. Durand*, 150 Ind. 203, 49 N. E. 1047; *Bradley v. Powell County*, 2 Humph. 428, 37 Am. Dec. 563; *State ex rel. Forsythe v. Seventh Judicial Dist. Judge*, 42 La. Ann. 1104, 8 So. 305; *Segars v. Parrott*, — La. —, 30 S. E. 353, 54 S. C. 1, 31 S. E. 677, 865; *East St. Louis v. New Brighton*, 34 Ill. App. 494; *Bridgenor v. Rodgers*, 1 Coldw. 259; *Maury County v. Lewis County*, 1 Swan, 235. That this court may properly intercede in such a case by the issuance of its prerogative writ is well settled. *State ex rel. Frich v. Stark County*, 14 N. D. 368, 103 N. W. 913; *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360; *State ex rel. Byrne v. Wilcox*, 11 N. D. 329, 91 N. W. 955; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234; *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33.

The learned counsel for defendants urge, with apparent confidence in the correctness of their position, that plaintiff is pursuing the wrong remedy. They, in effect, contend that while injunction is available to restrain contemplated proceedings to organize a county, that such remedy cannot be resorted to after the organization of such new county has been perfected. Among other things they say: "In the case at bar, it is true the writ is to test the legality of the organization of a county; if granted, the purpose served by the writ will be to dissolve the organization of the county. . . . The attorney general asks this court to investigate the facts . . . and from them declare that the organization of the county is illegal." We do not thus construe the petition, and it is apparent that defendants' counsel are laboring under a misapprehension regarding the object sought to be accomplished by petitioner. As we understand the attorney general's contention, he does not ask this court to determine the validity of the election at which the proposition for the organization of such new county was submitted to the electors, but he merely asks the intervention of this court to maintain *in statu quo* the rights of McLean county and its officers until the validity of such election is regularly determined in the mandamus proceedings, in order to obviate serious complications which would otherwise inevitably result from the threatened exercise by the alleged new county and its officers of jurisdiction in conflict with McLean county and its officers over the territory in question. Manifestly, the remedy by quo warranto is ineffectual for such purpose, as is held by some of the authorities above cited. The case of *Ford v. Farmer*, 9 Humph. 152, is urged by defendants' counsel as an authority directly supporting their contention. We do not so construe the opinion in that case, nor does the Tennessee court so construe it, as apparent by the cases of *Gotcher v. Burrows*, 9 Humph. 585; *Maury County v. Lewis County*, Swan, 235; and *Bridgenor v. Rodgers*, 1 Coldw. 259, subsequently decided by that court. The mere fact that the new county has a *de facto* existence is not an insuperable obstacle to the granting of the relief prayed for by petitioner under the facts presented in the petition. By this proceeding, as before stated, we are not asked to determine the validity of the alleged organization of Stevenson county. That question is directly involved and will be adjudicated in the pending manda-

mus case. In the interest of the public and all concerned, such proceeding should be speedily tried and determined by the district court.

Counsel for defendants have called our attention to a point decided by us on the appeal in the mandamus case relative to the validity of the publication of notice that such county division proposition would be submitted to a vote at the general election of 1908. We there held that a four weeks' publication was requisite. In this we, through inadvertence, no doubt committed error. The case was argued and submitted by counsel on both sides on the assumption that a four weeks' publication was requisite, and as a consequence our attention was not called to §§ 630 and 634 Rev. Code, 1905, which no doubt control. We embrace this, our first opportunity, to correct such mistake in order that the public generally may not be misled, and also for the guidance of the district court on the new trial of such case. The fact that a four weeks' publication of notice was not required is not necessarily conclusive or controlling as to the merits in the mandamus proceedings.

Our conclusion is that the motion to quash the petition should be overruled, and defendants will be given ten days in which to answer, if they so desire.

Judge CHARLES A. POLLOCK, of the Third Judicial District, participating as special judge by request.

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CITIZENS NATIONAL BANK OF JAMESTOWN, A United  
States Banking Corporation.

v.

OSBORNE-McMILLAN ELEVATOR COMPANY, A Foreign Cor-  
poration.

(131 N. W. 266.)

#### **Conversion — Chattel Mortgages — Nature of Interest of Mortgagee.**

1. A chattel mortgage in this state does not convey title to the mortgagee, but is only a lien on the property covered thereby. Hence the purchaser of property covered by a chattel mortgage takes it subject to the lien of such mortgage, and a conversion does not take place until the purchaser does some affirmative act, like a tortious detention of such property from the party entitled to possession thereof under the mortgage, or an exclusion or defiance of

such party's right, or the withholding of possession under claim of title inconsistent with that of the mortgagee.

**Conversion — Chattel Mortgages — Evidence.**

2. Where mortgaged wheat is sold to an elevator company, and no act of conversion is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand and refusal. *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608.

**Chattel Mortgage — Conversion — Evidence — Paramount Mortgage.**

3. Evidence of the existence of a mortgage given prior to the mortgage held by the plaintiff, on wheat in controversy, without showing a default in the terms thereof, or a demand for payment of a debt secured thereby, and for possession of the security, or that the plaintiff's subsequent mortgagee had notice or knowledge of its existence, is incompetent.

**Conversion — Chattel Mortgage — Evidence — Motion for Directed Verdict — Subsequent Proof.**

4. Appellant's right to have a directed verdict after plaintiff had rested its case was not changed by appellant thereafter submitting evidence concerning the filing and unpaid condition of the first mortgage, a demand for payment, and an agreement for extension of the same.

**Chattel Mortgage — Conversion — Paramount Mortgage — Measure of Damages — Evidence.**

5. In an action by a second mortgagee of wheat, against an elevator company for converting such wheat, proof of a prior mortgage thereon, duly filed, and unpaid, does not constitute a defense, but when properly brought before the court may be shown in mitigation of damages, to the extent of the amount due on and secured by the prior mortgage.

**Trial — Directed Verdict — Motion of Both Parties — Waiver of Jury.**

6. Numerous decisions of this court to the effect that when both parties move for a directed verdict at the close of a trial, they thereby waive the right to have the facts submitted to the jury, in the absence of any request therefor, and are estopped from predicated error upon the ground that the jury was not allowed to pass upon the facts, are adhered to.

Opinion filed March 22, 1911.

Appeal from District Court, Stutsman county; *Burke*, Judge.

Action by the Citizens' National Bank of Jamestown against the Osborne-McMillan Elevator Company.

From a judgment for plaintiff and an order denying a new trial defendant appeals.

Reversed, and new trial granted.



*Lee Combs*, for appellant.

A purchaser of personal property subject to a mortgage is not necessarily a wrongdoer or converter of the property. *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434; *Plano Mfg. Co. v. Northern P. Elevator Co.* 51 Minn. 167, 53 N. W. 202; *Gillet v. Roberts*, 57 N. Y. 28; *Ely v. Ehle*, 3 N. Y. 506; *Abernathy v. Wheeler*, 92 Ky. 320, 36 Am. St. Rep. 593, 17 S. W. 858; *Parker v. Middlebrook*, 24 Conn. 207; *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608; *Catlett v. Stokes*, 21 S. D. 108, 110 N. W. 84.

In an action for conversion it is a full defense to show that title and right to possession is in a third party not in the action. *Boyce v. Williams*, 84 N. C. 275, 37 Am. Rep. 618; *Krewson v. Purdom*, 13 Or. 563, 11 Pac. 281; *James v. Wilson*, 8 N. D. 186, 77 N. W. 603; *Omlie v. Farmers' State Bank*, 8 N. D. 570, 80 N. W. 689; *Clendenning v. Hawk*, 8 N. D. 419, 79 N. W. 878; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.

The court erred in denying defendant's motion for directed verdict, and in taking the case from the jury, defendant not having waived a jury. *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390.

*John Knauf*, for respondent.

The defendant converted the grain when it rendered it impossible for plaintiff to take possession upon a default in its mortgage. *Sandager v. Northern P. Elevator Co.* 2 N. D. 3, 48 N. W. 438.

Plaintiff is entitled to possession as against all but first mortgagee. *Sperry v. Ethridge*, 70 Iowa, 27, 30 N. W. 4.

**SPALDING, J.** This appeal was taken from a judgment of the district court in favor of the plaintiff and respondent against the defendant and appellant, and from an order of that court denying a new trial. The complaint alleges that one Peter Liegeman, to secure the payment of his promissory note held by the respondent, executed a chattel mortgage on his undivided half of the crop grown during the season of 1908, upon the north half of section 30, in township 133, north of range 62, west, in Stutsman county, and that during the year 1908 said Liegeman raised, harvested, and threshed as his share of said grain on said land, \$445 worth of wheat, oats, and barley, and delivered the same to the appellant at its elevator at Courtney, Stutsman county on or 21 N. D.—22.

about the 7th day of November, 1908; that such grain was at that time of the value of \$445. It alleges the right to possession under the terms of the chattel mortgage referred to, a demand and refusal, and conversion of the grain by the appellant, to respondent's damage in the sum of \$445. The answer, so far as material, denies specifically and generally the matters set forth in the complaint, concerning the mortgaging, raising, and sale of the grain by said Liegeman, and that it bought the grain so claimed to have been mortgaged, or did any act by reason of which the plaintiff was damaged in any sum. No objections appear in the record aimed at the sufficiency of either of the pleadings.

The execution, delivery, and filing of the chattel mortgage in question were duly proved, and that there was past due, on the note secured thereby, the sum of \$384.60. The mortgage contained the provisions usually found in chattel mortgages in this state, regarding the rights of the mortgagee to take possession, and among others, the following: "And it is further agreed that if default be made in the payment of said debt or any part thereof, or if at any time the said mortgagee or its assigns shall deem said debt unsafe or insecure, or whenever it shall choose so to do, then it is hereby authorized . . . to remove and sell the same, as provided by law for the sale of mortgaged property, and out of the proceeds of such sale to retain the amount of said debt," etc. It is unnecessary to consider separately all the errors assigned, as the determination of part of the questions disposes of all.

At the conclusion of plaintiff's case, the defendant submitted a motion to the court for the direction of a verdict in its favor. This motion was somewhat extended, but the first ground assigned was that the plaintiff had utterly failed to establish a *prima facie* case of conversion against the defendant.

The plaintiff had shown the amount of wheat raised, and that the mortgagor had delivered it to the defendant's elevator in September, or the first part of October, 1908; that at the date of such delivery the price of wheat was 93 cents; that he sold it to the defendant in the latter part of October or the first part of November of the same year, and that the price of wheat on the day of the sale was 95 cents per bushel, and that there were 543 bushels. It was shown that a demand was made by respondent on the elevator company for the wheat on the 20th or 21st day of December, 1908, and another demand there-

for some time in April, 1909, both of which were refused. It was not shown that any of the wheat had been mixed with other wheat, or that it had been shipped from the state.

1. The chattel mortgage did not transfer the title to the wheat to the respondent, but was only a lien thereon as security for the debt it described, and, being only a lien, appellant could store or purchase it, and do so subject to the lien of respondent's mortgage. *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434; *Catlett v. Stokes*, 21 S. D. 108, 110 N. W. 84. Having taken it subject to such lien, a conversion does not take place until some affirmative act on the part of the appellant, like tortious detention thereof from the owner, or the party entitled to the possession thereof, or an exclusion or defiance of such party's right, or the withholding of possession under a claim of title inconsistent with that of the plaintiff or owner. *Taugher v. Northern P. R. Co.* ante, 111, 129 N. W. 747. And as no such act was proven until the demand and refusal to deliver, there was no proof of conversion as having taken place prior to the 20th day of December, 1908. *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608.

2. The respondent having neglected to show the value of the grain as on the date of conversion, and only at the dates of delivery and sale, some weeks prior to the demand, had not made a prima facie case when it rested and the appellant submitted its motion for a directed verdict. Hence, it was error to deny such motion. *Towne v. St. Anthony & D. Elevator Co.* supra, *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 281, 91 N. W. 436. This rule rests upon the provisions of § 6585, Rev. Codes 1905, which reads: "The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion with the interest from that time; or (2) when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and (3) a fair compensation for the time and money properly expended in pursuit of the property."

3. Another ground stated for moving for a directed verdict was that it appeared from the respondent's evidence that there existed a prior unsatisfied valid outstanding lien upon the same property, given by the same party to one Hoster, which lien was given to secure the payment

of a debt which matured September 15, 1908, and in the payment of which default had occurred prior to the alleged sale or delivery to the appellant, as shown by respondent's own evidence, and that such creditor had demanded payment of the debt secured thereby, and was entitled to the possession of the grain as against plaintiff. The evidence shows a mortgage given to one Hoster to secure a note for about \$115 some two weeks prior to the execution of the mortgage under which the respondent claims, but did not show by competent evidence that such mortgage had been filed in the office of the register of deeds, or that appellant had notice or knowledge of its existence. We conclude that an insufficient showing had been made to warrant the trial court in taking the Hoster mortgage into consideration in acting upon the motion for a directed verdict at that time. Hence, as to this question no error was committed.

4. After the denial of appellant's motion for a directed verdict, appellant submitted evidence showing that the mortgage to Hoster had been filed October 26, 1907, and was still unsatisfied, and that a demand had been made upon the mortgagor for the payment of the amount due Hoster under such mortgage, but that an agreement had been entered into between Liegeman and such mortgagee for an extension of the time of payment of the debt secured thereby until the fall of the year 1909, whereupon both parties rested. The appellant then renewed its motion for a directed verdict upon substantially the same grounds stated at the close of respondent's case. Respondent also moved for the direction of a verdict without stating any grounds for such motion. The motion of the respondent was granted. The same reasons which we have stated as grounds for holding it error to deny appellant's motion in the first instance apply to its motion at the close of the case.

5. Another reason is assigned why it is claimed that the court erred in not granting appellant's motion for a directed verdict. Having arrived at the conclusion that the motion should have been granted under the authority of the cases cited, it is only necessary to refer to this additional ground claimed for guidance in case of a new trial. Appellant insists that a second mortgagee cannot maintain an action for conversion against a purchaser from the mortgagor of property on which there exists a prior mortgage which is in default. In this we think the appellant is mistaken, as this court has repeatedly held, as we have shown, that a chattel mortgage in this state does not convey title; it

is only a lien. Authorities cited by appellant under this point are from states where a chattel mortgage conveys title.

If the mortgagor has the right to sell, and the elevator company the right to buy, mortgaged property, and the latter takes it subject to the mortgage, it stands in the place of the mortgagor, except that it does not become personally liable on the note secured by the mortgagor.

No prior mortgage was pleaded by the defendant, either as a defense or in mitigation of the damages. No demand was shown to have been made by the holder of the first mortgage either on the mortgagor, the appellant, or the elevator company, for the delivery of the wheat by virtue of such mortgage. It was shown that the time of the payment of the indebtedness secured by the first mortgage had been extended to the fall of the year 1909. The effect of this extension of the first mortgage as the lien on the crop of 1908 is not discussed by counsel. The extension of the first mortgage, if any lien remains by reason thereof, upon the crop of 1908, under the circumstances of this case, if it may be a defense under any circumstances, is not a defense to an action for conversion brought by the holder of the second mortgage against the purchaser of the grain. Under proper pleadings, the existence of the lien of the first mortgage may be shown by the defendant, when sued by the holder of the second mortgage for conversion, to reduce the damages recoverable by the plaintiff. The holder of the second mortgage is only entitled to recover the value of his interest in the mortgaged property, and the value of his interest is necessarily reduced if the security is inadequate to respond to both liens, to the extent of the deficiency. In this case the wheat was more than sufficient in value to pay either one of the liens, but was inadequate to pay both. The first mortgage being for much less than the value of the wheat, the second mortgagee could recover the value of the wheat less the amount of the first lien. In *Newman v. Tymeson*, 13 Wis. 172, 80 Am. Dec. 735, which was a case identical with this, the court says: "The appellant was, by virtue of the mortgage, entitled to the immediate possession of the property as against all the world save the mortgagee named in the first mortgage, if still unpaid, and consequently can maintain an action for a taking which was not in pursuance of that mortgage, but in defiance of his right." See also *Frisbee v. Langworthy*, 11 Wis. 375; *Sperry v. Ethridge*, 70 Iowa, 27, 30 N. W. 4; *Moore v. Prentiss Tool & Supply Co.* 133 N. Y. 144, 30 N. E. 736; *Treat v. Gilmore*, 49 Me. 34.

6. The last assignment of error which need be referred to is that the court erred in taking the case from the jury by reason of the motions for a directed verdict. No reference is made to the fact that the motion of the plaintiff stated no reasons why a verdict should be directed. We therefore treat it the same as though it were a motion upon the ground of insufficiency of the evidence to constitute a defense. The appellant insists that the court erred in granting plaintiff's motion. We have already shown that the error consisted in directing a verdict for the plaintiff, and not directing it for the defendant. Appellant's position is that, by making such motion, it did not waive its right to a jury trial of the issues involved. This identical question has been repeatedly decided in this court adversely to the contention of the appellant. The last pronouncement is found, we think, in *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, where, in conformity with previous decisions of this court, it was held that when both parties, after the submission of all their evidence, make motions for a directed verdict, and neither one requests the submission of any fact to the jury, they thereby waive any right they might otherwise have to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. See also *Stanford v. McGill*, 6 N. D. 536, 572, 38 L.R.A. 760, 72 N. W. 938; *New England Mortg. Secur. Co. v. Great Western Elevator Co.* 6 N. D. 407, 71 N. W. 130; *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860; *Larson v. Calder*, 16 N. D. 248, 113 N. W. 103. Quotations from these authorities are unnecessary. In the instant case the motions were made without qualification, and no request was made for the submission of any fact to the jury. Appellant cites *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390, in support of its contention, but such authority is not in its favor. In that case one of the motions was qualified, and under the circumstances surrounding it the court held that it was insufficient to waive the submission of questions of fact not covered by the motion, to the jury, but expressly recognized the former decisions of this court to the effect that a submission to the jury is waived when nothing equivalent to a request that some fact or facts be submitted to the jury is made.

There is, however, one point of difference between the action of the court in the case at bar on these motions, and those in most of the authorities pointed out. In the case at bar the court discharged the

jury and took the case under advisement, and, in due time, made findings of fact and conclusions of law identically as though no jury had ever been impaneled, and entered judgment thereon. It is suggested that, this not being a literal compliance with the motion of either party, in that the jury was not permitted to go through the form of returning a verdict, the procedure was erroneous. We see no material distinction between this method and the one followed in most of the former cases. The fact that the parties had a constitutional right to a trial by jury in no manner affects the case. Authorities are to the effect that they, by the motions to take the case from the jury, waived a trial by jury, and that, not having thereafter requested the submission of any facts or questions to the jury, they are estopped from predicating error upon the action of the court in not permitting the jury to find the facts, and it is not essential that the form of returning a written verdict, signed by the foreman of the jury, be pursued in such case. If the court had power to direct the jury, it could proceed in a more direct manner to the same end, by finding the facts itself. *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. 479; *Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 184, 46 U. S. App. 85, 74 Fed. 285; *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860. In the last named case the procedure was identical with that in the case at bar, except that the trial court, after the motions were made, asked the parties if they desired to stand upon such motions, and, upon receiving an affirmative response, the jury was discharged and the court made findings. This action was sustained, and we see no difference whatever in principle between the two cases. The parties could waive their right to a jury by silence as plainly as by words. Some members of this court think, however, that, while both methods are proper, it is better practice to require the jury to return a formal verdict under the direction of the court.

The judgment of the trial court is vacated, and a new trial granted.

Hon. C. A. POLLOCK, Judge of the Third Judicial District, sat in place of BURKE, J., disqualified.

L. H. WEIL, W. C. Doble, and J. Westheimer, Doing Business Under the Firm Name of Weil, Doble, & Company, v. T. R. QUAM, Doing Business as Quam Clothing House.

(131 N. W. 244.)

**Attachment—Motion to Dissolve—Burden of Proof.**

1. In motions for dissolution of an attachment, the facts stated in the original affidavit being denied, the burden is on plaintiff to support the allegations thus made; failing to do this, the attachment should be dissolved.

**Attachment—Sufficiency of Affidavit—Language of Statute.**

2. While it is not necessary to use the exact language of the statute in the affidavit, yet the facts must be sufficiently stated, from which a conclusion "in language of the statute" would necessarily be drawn.

**Attachment—Sufficiency of Affidavit—Description of Property—Action for Purchase Price.**

3. Where the attachment is sought under subparagraph 8 of § 6938, the property must be described specifically. It is not enough to tell where the goods are, but definite allegations must be made showing what they are.

**Attachment—Affidavit Supplemented by Complaint.**

4. What the statute requires to be stated in the affidavit must be truly stated therein. Plaintiff cannot supplement a defective affidavit by facts stated in the complaint, unless it is verified and made a part of the affidavit.

Opinion filed March 28, 1911. Rehearing denied May 1, 1911.

Appeal from District Court, Eddy county; *Burke*, Judge.

Action by L. H. Weil et al., doing business under the firm name of Weil, Doble, & Company, against T. R. Quam, doing business as Quam Clothing House.

From an order dissolving an attachment, plaintiff appeals.

Affirmed.

*John Knauf*, for appellant.

One seeking to vacate an attachment must deny all grounds in the affidavit on which it was issued. *Hornick Drug Co. v. Lane*, 1 S. D. 129, 45 N. W. 329; *Lindquist v. Johnson*, 12 S. D. 486, 81 N. W. 900.

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Note.—Necessity that statement of material facts in affidavit for attachment be certain and definite in legal point of view, see *Goodman Bros. & Co. v. Henry*, 35 L.R.A. 847.

Right to amend affidavit for attachment, see note in 31 L.R.A. 422.



*Maddux & Rinker*, for respondent.

Where attachment is issued for levy on goods, for the purchase price of which the action was brought, the goods must be specifically described. *F. Mayer Boot & Shoe Co. v. Ferguson*, 17 N. D. 102, 14 L.R.A. (N.S.) 1126, 114 N. W. 1091.

POLLOCK, Special Judge. This is an appeal from an order setting aside an attachment. On the 26th day of May, 1909, plaintiffs, simultaneously with the commencement of an action, filed the following affidavit with the clerk of the court in which an attachment was issued, and levied upon certain personal property belonging to the defendant. Omitting the venue and title, the affidavit is as follows:

"K., being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action; that the defendant, T. R. Quam, has absconded and concealed himself from his place of business in North Dakota, and that he is now absconding and concealing himself so as to prevent the collection of debts against him, and that the debt upon which the foregoing action has been commenced was incurred for personal property sold to the defendant by the plaintiffs, and which consisted of goods, wares, merchandise, coats, socks, underclothing, hose, pants, and gents' furnishings now held and contained by the defendant in his storeroom in New Rockford, in said county and state, and which said goods, wares, and merchandise were sold to the said defendant at his special instance and request on or about the 31st day of October, 1908, and upon which there is due and unpaid the plaintiffs the sum of \$442.18." (Signed and duly verified.)

1. The attachment proceedings were commenced in pursuance of § 6938, subdivisions 2 and 8, which are as follows:

"In an action on a contract or judgment for the recovery of money only, for the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise, the plaintiff, at or after the commencement thereof, may have the property of the defendant attached in the following cases:

"2. When the defendant has absconded or concealed himself.

"8. In an action to recover purchase money for personal property sold to defendant, an attachment may be issued and levied upon such property."

The defendant by proper affidavit denied the facts stated in the moving papers.

In this condition of the record, the burden of proof fell upon the plaintiffs to support the allegations of their affidavit by a fair preponderance of the evidence. They furnished no testimony other than that contained in the original affidavit, while the defendant produced overwhelming evidence that he had not absconded or concealed himself. Upon that ground, therefore, the attachment was improvidently issued. *F. Mayer Boot & Shoe Co. v. Ferguson*, 17 N. D. 102, 14 L.R.A. (N.S.) 1126, 114 N. W. 1091.

Bennett, J., in *Wm. Deering & Co. v. Warren*, 1 S. D. 35, 44 N. W. 1068, upon a statute in all essential particulars similar to our own, fully discussed the rules governing the issue and dissolution of attachments. The doctrine there stated finds cordial approval by this court.

2. Respondent urges that the original affidavit was insufficient to permit the issuance of an attachment under subparagraph 8 above, in this: that the description of the property sought to be attached was indefinite and uncertain, and did not contain sufficient allegations as to the fact that the action was brought "to recover purchase money for personal properties sold to the defendant." We are of the opinion that, notwithstanding the language of § 6942 of the Revised Codes of 1905, stating that the warrant shall issue "upon a verified complaint, etc.," . . . "and an affidavit setting forth in the language of the statute one or more grounds of attachment enumerated in § 6938," etc., it is not necessary to use the exact words of the statute, provided the facts are sufficiently stated in the affidavit from which a conclusion "in the language of the statute" would necessarily be drawn. "The lien acquired by statute is an extraordinary remedy, and dependent wholly upon the statute, and the statute must be strictly, or at least, substantially, complied with." *Murphy v. Montandon*, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851. Tested by these rules, the allegations as to "the purchase price" were sufficient.

3. Was the affidavit sufficient as to the description of the property? We think not. By this subparagraph 8, a special lien is attempted to be given, and specific personal property is sought to be taken. As in this case, the property is frequently mixed with other property upon which other persons may have a right to levy. The object of the statute is, not only to give the defendant notice of what is attached, but to warn

other creditors as well. Every person in any manner entitled to have or secure an interest in such property should have a proper basis of information, upon which he could act if necessity required. It is not enough to tell where the goods are, but definite allegations must be made showing what the goods are. This ruling does not require an impossibility. Generally speaking, a description of the property can be easily secured. Where sales to merchants are made, resort to invoices of properties sold will furnish such information. The fact that more property is described in the affidavit than can be found would not defeat the proceedings as to the property described, which was actually found.

4. Nor can the affidavit in this case be aided by reference to the complaint or the return of the sheriff, who stated: "I then and there executed said warrant by seizing a portion of the goods, wares, and merchandise in the possession of the defendant in his storeroom in New Rockford, North Dakota, theretofore sold to the defendant by said plaintiffs, and a copy of the inventory therein is set forth herein as follows," adding a full description. What the statute requires to be stated in the affidavit must be truly stated therein, and, if not so stated, the attachment should be dissolved, even though the requisite facts omitted in the affidavit are alleged in the complaint. *Fisk v. French*, 114 Cal. 400, 46 Pac. 162. When a motion to dissolve an attachment is on the ground that the affidavit is not sufficient to sustain an attachment, the plaintiff cannot supplement the defective affidavit by facts stated in the complaint, unless it is verified and made a part of the affidavit. *Fleming v. Byrd*, 78 S. C. 20, 58 S. E. 965.

If the affidavit cannot be aided by assistance from necessary allegations in the complaint, much less can it be by the statement of an officer that he had levied upon the properties sold to the defendant by plaintiffs.

The order setting aside the attachment is affirmed, with costs for respondents.

All concur, except MORGAN, Ch. J., not participating, and BURKE, J., disqualified.

BURKE, J., having tried the case below, did not sit in the case, and took no part in the decision, Honorable CHARLES A. POLLOCK, Judge of the Third Judicial District, sitting in his stead.

LANPHER-SKINNER COMPANY, a Foreign Corporation, v. T. R.  
QUAM, Doing Business as Quam Clothing House.

(131 N. W. 246.)

Opinion filed March 28, 1911. Rehearing denied May 1, 1911.

Appeal from District Court, Eddy county; *Burke*, Judge.  
From an order dissolving an attachment, plaintiffs appeal.  
Affirmed.

*John Knauf*, for appellant.

*Maddux & Rinker*, for respondent.

PER CURIAM. This action involves the identical questions decided at this term in the case of *Weil v. Quam*, ante, 344, 131 N. W. 244, and it was agreed that the decision in this case should follow that.

The judgment of the lower court in dissolving the attachment is therefore affirmed.

All concur, except MORGAN, Ch. J., not participating, and BURKE, J., disqualified.

BURKE, J., having tried the case below, did not sit in the case, and took no part in the decision, Honorable CHARLES A. POLLOCK, Judge of the Third Judicial District, sitting in his stead.

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MRS. R. E. HEARD v. MRS. L. M. HOLBROOK.

(131 N. W. 251.)

**Justice of the Peace — Voluntary Appearance — Waiver of Special Appearance.**

1. A defendant who, after appearing specially for the purpose of objecting to the jurisdiction of a justice of the peace, thereafter moves for a change of venue, and, at the time fixed for trial by the justice to whom the case has been transferred, appears and defends the action on the merits, thereby makes a voluntary appearance in the action, and he must be deemed to have waived the benefit of such special appearance and the objections urged thereunder to

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Note.—Mandamus in exercise of superintending control over inferior courts, see note in 51 L.R.A. 33.

jurisdiction over his person. Since the decision in the case of *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, the legislature has amended and re-enacted the statute then in force (§ 11, Justices' Code, 1877, being § 6050, Comp. Laws, 1887) by prescribing what shall constitute a voluntary appearance. Hence such case is no longer a controlling authority.

**Justice of the Peace — Appeal — Collateral Attack.**

2. The transcript of the justice on appeal is not subject to impeachment in the district court collaterally, and such court properly denied defendant's motion for an order requiring the justice to alter his docket entries, and for the same reason that court properly refused to receive parol proof contradicting such docket entries.

**Justice of the Peace — Mandamus — Compelling Judicial Action.**

3. Mandamus will not lie to compel the justice to alter his docket entries to conform to alleged facts claimed by the relator to exist.

Opinion filed March 28, 1911. Rehearing denied May 3, 1911.

Appeal from District Court, Pierce county; *A. G. Burr, J.*

From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

*Paul Campbell*, for appellant.

Where a party served with irregular process promptly calls the court's attention to it, service should be quashed and case dismissed. 20 Enc. Pl. & Pr. p. 1162; 24 Cyc. Law & Proc. pp. 519 & 521; *Waring v. McKinley*, 62 Barb. 612; *Titus v. Whitney*, 16 N. J. L. 85, 31 Am. Dec. 228; *Richmond & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; 32 Cyc. Law & Proc. pp. 459, 519-526; *Wood v. Payea*, 138 Mass. 62; *Monroe v. White*, 25 App. Div. 292, 49 N. Y. Supp. 517; *Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840; *Jones v. Danforth*, 71 Neb. 722, 99 N. W. 495; *Hoitt v. Skinner*, 99 Iowa, 360, 68 N. W. 788; *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343; *Falkner v. Guild*, 10 Wis. 563.

Continuance before a return date, and on grounds not statutory, divests jurisdiction. 4 Enc. Pl. & Pr. pp. 893-896, and cases cited; *Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693; *Spencer v. Perry*, 17 Me. 413; *Stretch v. Forsyth*, 3 N. J. L. 713; *Halsey v. Whitlock*, 3 N. J. L. 869; *Nicholson v. Wright*, 16 N. J. L. 232; *Deland v. Richardson*, 4 Denio, 95; *Stadler v. Moors*, 9 Mich. 264; *Pinney v. Petty*, 47 Vt. 416; *Briggs v. Tye*, 16 Kan. 285; 24 Cyc. Law & Proc. pp. 487, 577,

578, 637; *Ruberts v. Hathaway*, 42 Mich. 592, 4 N. W. 307; *Leonosio v. Bartilino*, 7 S. D. 93, 63 N. W. 543; *Lyman-Elie! Drug Co. v. Cooke*, 12 N. D. 88, 94 N. W. 1041; *Plano Mfg. Co. v. Stokke*, 9 N. D. 40, 81 N. W. 70; *Hatch v. Christmas*, 68 Mich. 84, 35 N. W. 833; *Benoit v. Revoir*, 8 N. D. 226, 77 N. W. 605.

Failure to enter judgment on return of verdict divests the justice of jurisdiction of person and subject-matter. 24 Cyc. Law & Proc. pp. 597-603; 12 Enc. Pl. & Pr. pp. 730-732; 12 Am. & Eng. Enc. Law, p. 459; *Porter v. Parker*, 4 Dak. 397, 33 N. W. 70; *Re Evingson*, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733; *Sluga v. Walker*, 9 N. D. 108, 81 N. W. 282; *Clark v. Read*, 5 N. J. L. 486; *Peterson v. Hansen*, 15 N. D. 198, 107 N. W. 528; *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171; Rev. Codes 1905, §§ 8436, 8437.

Lower court can be compelled to correct its return. 3 Cyc. Law & Proc. pp. 50-52, 141, 144, 152; 25 Cyc. Law & Proc. p. 215; 2 Enc. Pl. & Pr. pp. 301, 303; 17 Enc. Pl. & Pr. p. 917; *Foster v. Woodfin*, 65 N. C. 29; *State v. Christensen*, 21 Minn. 500; *Landa v. Harris*, — Tex. Civ. App. —, 40 S. W. 551; 24 Cyc. Law & Proc. p. 500; *Struber v. Rohlf*s, 36 Kan. 202, 12 Pac. 830; *Wilson v. Paxton*, 7 Kan. App. 79, 52 Pac. 911; *McCormick Harvesting Mach. Co. v. Halvorson*, 11 S. D. 427, 74 Am. St. Rep. 820, 78 N. W. 1000; *Worley v. Shong*, 35 Neb. 311, 53 N. W. 72.

Mandamus lies to correct docket entries. *State ex rel. Green v. Van Ells*, 69 Wis. 19, 32 N. W. 32; *Larson v. Johnson*, 83 Minn. 351, 86 N. W. 350.

*L. N. Torson* and *R. E. Wenzel*, for respondents.

Defective designation of return day in summons is sufficient to require diligence of defendant. 20 Enc. Pl. & Pr. p. 1162; *Merrick v. Mayhue*, 40 Mich. 196; 12 Enc. Pl. & Pr. p. 671; *Bliss v. Harris*, 70 Ill. 343; *Wright v. Phillips*, 2 G. Greene, 191; 20 Enc. Pl. & Pr. p. 1171.

Substantial compliance with statutes regulating powers of a justice of the peace is sufficient. 12 Enc. Pl. & Pr. p. 671; *Hanson v. Gronlie*, 17 N. D. 191, 115 N. W. 666; *Nadel v. Campbell*, 18 Idaho, 335, 110 Pac. 262; *Lyman-Elie! Drug Co. v. Cooke*, 12 N. D. 88, 94 N. W. 1041.

Appearance for any purpose except to object to jurisdiction waives defects in summons. *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343; *William Deering & Co. v. Venne*, 7 N. D. 576, 75 N. W. 926; *Mead v.*

Sanders, 57 Minn. 108, 58 N. W. 683; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

One objecting to jurisdiction cannot participate in any proceedings on the merits, and save his special appearance. 12 Am. & Eng. Enc. Law, p. 440; 2 Enc. Pl. & Pr. pp. 625, 626; 12 Enc. Pl. & Pr. pp. 630, 631, 693; 3 Cyc. Law & Proc. p. 525, subdiv. 3; Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Lowe v. Riley, 57 Neb. 252, 77 N. W. 758; Plano Mfg. Co. v. Nordsrom, 63 Neb. 123, 88 N. W. 164; Nesbit v. Long, 37 Ind. 300; Burt v. Bailey, 21 Minn. 403; Magmer v. Renk, 65 Wis. 364, 27 N. W. 26; Lowe v. Stringham, 14 Wis. 222.

Justice's docket cannot be attacked upon affidavits or parol testimony showing falsification. Plymat v. Brush, 46 Minn. 23, 48 N. W. 443; Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967; Freeman, Judgm. 40, 41; Troy v. Rodgers, 162 Mich. 28, 127 N. W. 31; McCormick v. Cleveland, 98 Wis. 522, 67 Am. St. Rep. 827, 74 N. W. 339; State ex rel. Hanke v. Myers, 70 Minn. 179, 68 Am. St. Rep. 521; 72 N. W. 969; Smith v. Petrie, 70 Minn. 433, 73 N. W. 155; Smith v. Kistler, 84 Minn. 102, 86 N. W. 876; Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137; Re Evingson, 2 N. D. 184, 33 Am. St. Rep. 768, 49 N. W. 733; 2 Enc. Pl. & Pr. pp. 301, 302.

Mandamus will not lie to compel justice to correct his docket. Garnett v. Stacy, 17 Mo. 601, cited in 26 Cyc. Law & Proc. p. 197; Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; 26 Cyc. Law & Proc. p. 178; State ex rel. Mooney v. Edwards, 51 N. J. L. 479, 17 Atl. 973; 26 Cyc. Law & Proc. pp. 172, 215; Ross v. Lane, 3 Smedes & M. 695, cited in 26 Cyc. 423; O'Brien v. Tallman, 36 Mich. 13.

Fisk, J. This litigation arose in the justice's court of one George W. Fraine, justice of the peace at Rugby, in Pierce county. Summons was issued by such justice on June 27th, 1908, and the return day was apparently first designated as July 3d and afterwards changed to July 8th; and in making such change the figure "8," was apparently placed over the figure "3," leaving it somewhat illegible. The copy of the summons which was served on defendant is, as to the return date, equally illegible, but the figure appears more like the figure "3" than the figure "8," and the letters "rd" attached thereto were not changed as in the original. On July 3d defendant, through her attorney, made

a special appearance before such justice, and moved to dismiss the action and to quash the service of the summons therein, "for the reason that no copy of the summons in this action has been served upon this defendant, and that the purported copy contains no date for the appearance of the defendant, and that the purported date is illegible." Such motion was denied and an exception saved. The justice's transcript discloses that on July 6th such justice, on his own motion, postponed the trial of such action until July 9th, giving as a ground therefor the pendency of other matters before the court. On July 9th the case was called, and the defendant, by her attorney, appeared specially, and moved to dismiss upon the same grounds which were assigned in his previous motion; and also upon the ground that the court, by such postponement, had lost jurisdiction, which motion was denied and an exception saved. Thereupon defendant made a motion for change of venue, supporting the same by the statutory affidavit, and the action was transferred to one Phil. Cocking, justice of the peace in said county, who set the date of hearing on July 13th at his office in Rugby. It is conceded by appellant's counsel that the making of the motion for such change of venue operated as a voluntary appearance in the action. On the latter date both parties appeared, and appellant filed an answer to the plaintiff's complaint and demanded a jury trial. A jury was accordingly impaneled and a trial had, which resulted in a disagreement of the jury, whereupon a second jury was impaneled, and the cause tried upon the merits, resulting in a verdict in plaintiff's favor on July 14th. Thereafter, and on July 16th, the record discloses that the defendant, through her attorney, made another special appearance for the purpose of objecting to the jurisdiction of the court, and moved to dismiss the action for the reason "that a verdict was given and entered in this action by a jury on July 14, 1908, and that judgment has not been rendered or entered thereon, and was not so rendered or entered on said date, and no adjournment was taken or entered on the docket herein, and said judgment was not rendered or entered after the verdict in said action, and as required by law, and that said justice has not jurisdiction to enter and render said judgment in said action, but has lost jurisdiction thereby." Such motion was in writing, and bears the filing mark of the justice, but the transcript of the justice's



docket contains no ruling thereon. Such transcript, however, contains a recital as follows:

Upon return of the verdict of the jury, the court orders and adjudges that the plaintiff have and recover judgment against the defendant for the sum of \$6 and costs of this action, taxed by me at \$32.80, total \$32.80.

[Signed] Phil Cocking, J. P.

Thereafter an appeal was taken and duly perfected from such judgment to the district court, and on January 21, 1909, defendant moved for an order of the district court correcting the transcript certified upon such appeal by said justice of the peace, so that the same would show that judgment was not entered on the verdict of the jury until July 16th, and to make certain other changes in such transcript. In support of the motion, defendant's counsel produced certain affidavits showing what he contended to be the true facts regarding the date of the entry of judgment by the justice. The district court denied such motion, and this ruling forms the basis of one of appellant's assignments of error.

On April 21, 1909, the appeal came regularly on for hearing in the district court, at which time defendant's counsel sought to prove, by extrinsic evidence, that certain entries in the justice's docket were false, which offer was refused and exception taken. Defendant's counsel then requested that further proceedings on such appeal be stayed until the determination of a certain mandamus proceeding, instituted by defendant to compel the justice to make certain alleged corrections in the docket entries in said action, which request was also refused and an exception taken.

Thereafter the district court made its order directing the entry of judgment in plaintiff's favor, and judgment was entered on December 6th. On February 17, 1910, an order to show cause was issued by the district court on defendant's motion, returnable February 28th, requiring plaintiff to show cause why the order for judgment theretofore entered should not be vacated or modified in so far as it directed the clerk to enter the judgment of the justice of the peace as and for the judgment of the district court, and why the judgment as entered should not be modified in certain particulars so as to conform to the

order for judgment. On the return of such order to show cause, the order for judgment and judgment theretofore entered were modified in certain particulars not here material to mention, and defendant's counsel excepted to the refusal of the court to vacate *in toto* both the said order and the judgment entered pursuant thereto.

Appellant's first, second, and third assignments of error are predicated upon the refusal of the district court to sustain her contentions with reference to the alleged want of jurisdiction of the justice because of the defect in the summons above referred to, and the postponement of the case by the justice.

These assignments are devoid of merit. By moving for a change of venue, and by answering and going to trial on the merits, it is entirely clear under the statute, as it has existed since January, 1896, that defendant waived the benefit of her special appearance, and forever foreclosed her right to urge a lack of jurisdiction of the justice. Appellant relies upon the case of *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, in support of her contention that she has not waived her objections to the jurisdiction of the justice's court. That decision was rendered, however, prior to the adoption of the Revised Codes of 1895, and under a statute radically different from the present one. This important fact appellant's counsel has apparently overlooked, although in his brief he remarks that § 8358, Rev. Codes 1905, would seem to be in conflict with the opinion in the *Miner Case*. It is not strange, that this conflict should thus appear to counsel, for it was the evident purpose of the legislature in amending the section in the 1895 Revision to change the rule announced in that case. At the time the *Miner Case* was decided, § 6050, Compiled Laws 1887, was in force, reading as follows: "An action in a justice's court is commenced by issuing the summons, or by the voluntary appearance and pleading of the parties." In the 1895 Revision, the section was amended and re-enacted to read: "An action in a justice's court is commenced by the issuance of a summons, or by the voluntary appearance and pleading of the parties. An appearance for any purpose except to interpose or maintain an objection to the jurisdiction assumed under the process is a voluntary appearance." Sec. 6635, Rev. Codes 1895. It needs no argument to show that under the section last quoted defendant made a voluntary appearance in the action when she moved for a change of venue, an-

swered and went to trial on the merits. This is expressly conceded by appellant's counsel, for he says in his brief: "We are therefore fairly confronted with the question whether, after special appearance, objection overruled, and exception, a voluntary appearance is a waiver of jurisdictional questions." The legislature, by the above change in the statute, has expressly made certain acts of a defendant a voluntary appearance, which were held not such an appearance in the Miner Case. The decision in that case was expressly based upon the fact that a voluntary appearance had not been made by defendant.

Appellant's fourth assignment is likewise without merit. It is predicated upon the contention that judgment was not entered by the justice immediately upon the return of the verdict of the jury. A complete answer to such contention is the fact that the record certified to the district court does not disclose the alleged failure of the justice in this respect. On the contrary, as above shown, the record shows that judgment was rendered upon the return of the verdict.

Assignments 5, 6, 7, and 8 are predicated upon rulings of the district court in denying defendant's motion for an order compelling the justice to change his docket record, and to certify up to the district court such amended record; and also the ruling of the district court in refusing to permit defendant to show by parol testimony facts inconsistent with those recited in the justice's transcript certified upon the appeal. Such rulings were clearly correct. The record certified to by the justice is not subject to collateral attack in this manner.

The remaining two assignments relate to the refusal of the district court to stay proceedings on the appeal until certain mandamus proceedings are disposed of, and also to the form of judgment entered in the district court. We are unable to discover any error in the rulings complained of. The judgment as entered was in strict conformity with correct practice, and we are at a loss to discover how, by mandamus, defendant could hope to compel the justice to make and certify a different record than the one he had already transmitted to the district court.

For an authority directly in point, holding that mandamus will not lie under these facts to compel the justice to change his record, see *State ex rel. Mooney v. Edwards*, 51 N. J. L. 479, 17 Atl. 973. We quote from the opinion as follows: "The docket of the justice contains the following entries: 'August 17, 1888, the defendants applied

for an appeal, which was granted, and gave bonds, which were filed by me and approved. August 18, 1888, affidavit of defendants filed by me.'

"These entries the relator declares to be erroneous in point of fact, and conceives that this court may, by its writ of mandamus to be directed to the said justice, command him to alter his docket so that it shall conform to what the relator avers is the fact, *viz.*, that the bonds were filed upon August 18th, 1888, the day upon which, according to the docket, the affidavits were filed.

"The respondent, while maintaining the accuracy of the justice's docket, contends, *in limine*, that, even supposing the justice's record to be erroneous, mandamus is not a proper remedy.

"The jurisdiction by the writ of mandamus over inferior judicial tribunals is one so constantly applied that its limitations are notorious and well defined. It is the proper remedy to compel inferior tribunals to exercise their functions, and to render some judgment in cases before them where, from delay or refusal to act, a failure of justice is apprehended. In cases of this nature the province of this writ is neither to direct what judgment shall be rendered by the tribunal to which it is addressed, nor to compel one in whom discretion is vested to act in any specified manner. Its function is to insure action where inaction prevails; to speed a cause which has fallen into judicial stagnation.

"The contention of the relator, however, is that the act here sought to be affected, *viz.*, the entry in the justice's docket of the date of the filing of the appeal bonds, was a simple ministerial act which the justice performed as clerk of the court for the trial of small causes rather than as its judge.

"The distinction thus made is a valid one, and lies at the foundation of the system of rules which regulate the use of this extraordinary writ. Stated in a general way, the distinction is that the writ of mandamus will issue to compel the performance, in a specified manner, of ministerial duties so plain in point of law, and so clear in matter of fact, that no element of discretion is left as to the precise mode of their performance; but that as to all acts or duties depending upon a jurisdiction to decide questions of law or to ascertain matters of fact, on the part of the officer or body at whose hands their performance is required, mandamus will not lie. As a corollary to this latter clause, it

may be added that, as the writ will not issue to dictate in advance how the discretion shall be exercised, or the matter of fact decided, neither will it be allowed to disturb or override such determinations if already reached."

Finding no error in the record, the judgment and order appealed from are affirmed.

All concur, except MORGAN, Ch. J., not participating.

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A. E. WOOD v. MARY U. PEHRSSON, Lottie E. Pehrsson, Gustave Victor E. Pehrsson, Peter Adolfus Johannes Pehrsson, Frederick Daniel Pehrsson, and Mary U. Pehrsson, Executrix of the Last Will and Testament of Gustaveus A. Pehrsson, Deceased.

(130 N. W. 1010.)

**Principal and Agent—Accounting—Presumption—Burden of Proof.**

1. In an action brought to foreclose certain mortgages, defendants, by their answer, expressly admit the execution and delivery by them to plaintiff of such mortgages and notes secured thereby. Such answer by way of defense alleges, in substance, that for several years prior to the date such notes and mortgages were given, plaintiff acted as agent for defendants in various business dealings involving farming and other transactions, and from time to time made certain advancements to them, and received the proceeds of certain grain and stock shipments, and in general took charge of the financial affairs of defendants. That from time to time notes and mortgages were given by defendants, or some of them, to secure loans and advances made by plaintiff, and that such notes and mortgages were executed and delivered without any actual settlement or statement of account between them, but merely for the convenience of the parties and in anticipation of future advances to be made by plaintiff, and that no final or complete accounting or settlement was ever made by the parties. It is further alleged that defendants were unable to keep an accurate account of the numerous transactions aforesaid, and that they relied upon plaintiff so to do, and that consequently they have no means of ascertaining either the actual or approximate indebtedness owing by them to plaintiff. They also allege plaintiff's failure to account for the proceeds of certain real property sold by him as such agent for one of the defendants; also his failure and refusal to account for the proceeds of certain loans which he, as such agent, secured from others for one of the defendants. The answer prays that plaintiff be required to account to defendants for all such transactions. No fraud is alleged.

The proof shows that on July 15, 1903, and at various dates prior thereto, the parties had accountings, at each of which balances were agreed upon, and notes and mortgages executed and delivered by defendants to secure the payment thereof.

*Held*, that, in the absence of fraud or mistake, it will be presumed that such accountings and settlements were fairly made, and that they embraced all prior transactions between the parties.

*Held*, further, that the burden is on defendants to overthrow such presumption, and that they have failed to meet and overthrow the same, or to show that such settlements were erroneous in respect to any item in the account.

#### **Pleading — Amendment — Discretion.**

2. At or near the close of the trial, which lasted about two weeks, the lower court, over plaintiff's objection, permitted the filing of an amended answer raising new issues.

*Held*, for reasons stated in the opinion, that such ruling was an abuse of discretion.

#### **Accounting — Review.**

3. On the trial plaintiff accounted for all transactions between the parties which occurred subsequent to the July 15, 1903, settlement, and from a consideration of the testimony it is held that there was a balance due plaintiff on January 1, 1906, of \$3,900.97, and that, to the extent of such sum with interest, plaintiff has a lien under the chattel mortgage in suit, and is entitled to a foreclosure thereof, as prayed for in his complaint.

#### **Insanity — Evidence.**

4. It is contended on behalf of one of the defendants that she was, at the time of signing the notes and mortgages, of unsound mind, and mentally incompetent to enter into a binding obligation. The evidence fails to show that she was "a person entirely without understanding," within the meaning of §§ 4018 and 4019, Rev. Codes 1905, and it is accordingly held that such defense is not established.

#### **Will — Equitable Conversion.**

5. The real property described in the real estate mortgage in suit was owned, at the time of his death, by one Gustaveus Pehrsson, husband of one of the defendants and father of the others, who died testate in 1895. By the terms of his will his executrix was directed, on or before a certain date, to sell such real property, and to distribute the proceeds among his children.

*Held*, that such provision operated, at the death of the testator, as an equitable conversion of such real property into personalty for the purposes of its administration.

*Held*, further, that, notwithstanding this fact, such mortgage will be treated in equity as an hypothecation by the mortgagors of whatever interests in such estate they possessed at the date of such mortgage, to the extent of the proceeds of such real property.

**Equity — Construction of Instruments — Substance Rather than Form.**

6. Equity looks beyond the mere form of an instrument to its substance, and will consider and give effect, when possible, to the apparent object and purpose of the parties in executing it.

**Dismissal.**

7. As to defendants Peter and Frederick Pehrsson, no cause of action is established, and it is accordingly held that the action, as to them, should be dismissed with costs.

Opinion filed April 1, 1911.

Appeal from District Court, Cass county; *E. B. Goss*, Judge.

Action by A. E. Wood against Mary U. Pehrsson and others. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

*Engerud, Holt, & Frame*, for appellant.

An agreed account cannot be impeached except for fraud, mutual mistake, undue influence, or duress. *Montgomery v. Fritz*, 7 N. D. 348, 75 N. W. 266; *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Klauber v. Wright*, 52 Wis. 303, 8 N. W. 893; *Christofferson v. Howe*, 57 Minn. 67, 58 N. W. 830; *Porter v. Price*, 26 C. C. A. 70, 49 U. S. App. 295, 80 Fed. 655; *Long-Bell Lumber Co. v. Stump*, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; *Chubbuck v. Vernam*, 42 N. Y. 432; 1 Cyc. Law & Proc. 454, and note 88.

It is immaterial that the relation between the parties is a fiduciary one. *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053; *Hoyt v. McLaughlin*, 52 Wis. 280, 8 N. W. 889; *Philips v. Belden*, 2 Edw. Ch. 1; *Moses Bros. v. Noble*, 86 Ala. 407, 5 So. 181; *Paulling v. Creagh*, 54 Ala. 647.

Check stub entries made in the ordinary course of business, known to be correct at the time, are competent to refresh witness's recollection, and are admissible as independent evidence. 1 Wigmore, Ev. Secs. 735, 736; *Raynor v. Norton*, 31 Mich. 210; *Ætna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. ed. 810; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 30 Am. Dec. 130; *Guy v. Mead*, 22 N. Y. 462; *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54.

*Pierce, Tenneson, & Cupler, Robert M. Pollock, and S. G. More,* for respondents.

Courts are liberal in allowing amendments. *Martin v. Luger Furniture Co.* 8 N. D. 220, 77 N. W. 1003; *Stringer v. Davis*, 30 Cal. 318; *Smith v. Yreka Water Co.* 14 Cal. 202; *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197; *Hayden v. Hayden*, 46 Cal. 332; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570; *Rae v. Chicago, M. & St. P. R. Co.* 14 N. D. 507, 105 N. W. 721; 1 Enc. Pl. & Pr. pp. 485, 500; *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114; 1 Am. & Eng. Enc. Law, p 757; *Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525.

FISK, J. This litigation arose in the district court of Cass county, and the action is one to foreclose two certain mortgages, one a chattel mortgage dated July 26, 1905, given by defendant Mary U. Pehrsson, to secure the payment to plaintiff of the sum of \$6,077.28 and interest, and the other a real estate mortgage dated January 27, 1905, given by defendants Mary U., Lottie, and Gustave Victor Pehrsson, to secure the payment to plaintiff of the sum of \$5,077.28 and interest; the latter sum being a portion of the indebtedness secured by such chattel mortgage, and all of such indebtedness being represented by numerous promissory notes, some of which were executed by Mary U. Pehrsson alone, and others by her and the other two defendants above named. The complaint is in the usual form. All of the defendants, with the exception of Lottie, answered together, expressly admitting the execution and delivery of the notes and mortgages described in the complaint. Such answer then alleges, by way of defense, substantially the following facts:

That defendant Mary U. Pehrsson is the widow of one Gustaveus A. Pehrsson, who died in 1895, and the defendants Lottie, Gustave Victor, Peter Adolphus, and Frederick Daniel are the children of Mary U. and Gustaveus, aforesaid. That the said Gustaveus A. Pehrsson died testate, designating as executrix of his last will and testament the said Mary U. Pehrsson. That about the year 1901, the plaintiff was duly appointed guardian of said children, who were at that time minors, and that he is still guardian of the defendant Frederick, the other children having arrived at majority; that among the



property devised by the will of Gustaveus to the said children is a farm consisting of about 800 acres, in Cass county.

The answer further alleges that defendant Mary U. Pehrsson is of Swedish nationality, and unskilled and inexperienced in the practical affairs of farming and the transaction of general business, and that from the date plaintiff was thus appointed guardian of the children, and for four or five years thereafter, he assumed to act for the said Mary U. Pehrsson in the numerous and various transactions of operating said farm, and in probating the estate of the said Gustaveus, deceased, and that during all such time he acted as an adviser and friend for the said Mary U. Pehrsson and her children, and that, relying upon his honesty and integrity, Mary reposed unlimited confidence in the said plaintiff, and permitted him to advise with her in all business transactions, and that he was permitted, to a large extent, to handle her financial matters; that, from time to time during said period, plaintiff advanced moneys to the defendant Mary Pehrsson, to assist her in such farming operations, and, to secure the payment of such advances, he, from time to time, took notes and mortgages from her and some of the children, such mortgages covering both chattels and real property belonging to the defendants; and during such period plaintiff was permitted to market the crops grown by defendants, receiving the proceeds thereof, and also the proceeds of sales of stock and other property on said farm belonging to defendants. That plaintiff during said time owned and farmed land in the vicinity of defendants' farm, and frequently used the stock, implements, machinery, and employees of defendants on his said farm, and that he commingled and intermingled to a great extent the crops raised upon the farm of defendants with his own, as well as the proceeds of such crops.

That the several notes and mortgages executed and delivered from time to time by defendants, or some of them, to plaintiff, were thus executed and delivered without any actual settlement or statement of account between the parties, and without any fixed or just consideration, but simply for the general convenience of the parties, and in anticipation of advances to be made by him to the defendants; and they allege that no final and complete accounting or settlement has ever been made between them.

It is then alleged that defendants were unable to keep an accurate account of the numerous transactions between them and the plaintiff,

and that defendants intrusted and relied upon the plaintiff to keep such an account, and defendants alleged that they do not know, nor have they any means of ascertaining, the actual or approximate indebtedness which may exist against them in plaintiff's favor.

It is further alleged that during said time defendant Mary U. Pehrsson conveyed to plaintiff certain property owned by her personally, to be sold by him and accounted for to said defendant; that thereafter he did, in fact, sell said property, but has failed, refused, and neglected to account therefor in any manner.

It is further alleged that in the year 1905 plaintiff assisted the defendant Mary U. Pehrsson, as executrix, in procuring a loan in the sum of \$4,000 upon certain of the premises belonging to said estate, and that a large portion of such loan was paid over to the plaintiff, and that he has failed and refused to properly account for the same.

It is further alleged that the defendants Gustave Victor and Lottie E. Pehrsson were never in any manner indebted to the plaintiff in any sum whatever, and that they signed the notes described in the complaint solely as an accommodation for their mother, and that they never received any consideration therefor.

That the defendants Petre and Frederick are in no manner indebted to the plaintiff in any sum whatever, and that as to them said action should be dismissed with costs.

The answer concludes by an allegation that, upon a full, fair, and complete accounting of all the transactions between the parties, it will appear that the defendants are not indebted to the plaintiff in any sum whatsoever. The prayer is that plaintiff be required to account to the defendants, and that, upon such accounting, judgment be entered in favor of the party or parties for such balance as may be found to be due him or them, and for general relief.

The defendant Lottie E. Pehrsson answered separately through her guardian *ad litem*, alleging that, at the time of the execution and delivery of the notes and mortgages described in the complaint, she was and still is of unsound mind and incapable of transacting any business whatsoever. She also alleges that the several promissory notes and mortgages signed by her were thus executed and delivered without any consideration so far as she is concerned.

A reply consisting of a general denial was interposed by the plaintiff, pursuant to the direction of the court.

The issues thus framed were duly brought on for trial on February 15, 1908, and such trial was not concluded until February 29. A great mass of testimony was introduced relating to the status of the account between the parties. As a result of such trial, the court below found and adjudged, among other things, that plaintiff is indebted to the defendants in the sum of \$1,234, together with the costs and disbursements, taxed at \$514.40, including therein attorneys' fees in the sum of \$390, and that all the promissory notes and mortgages described in the complaint be declared null and void, and canceled of record.

The plaintiff, on the contrary, contends that he is entitled to recover against the defendants, as disclosed by the evidence, the sum of \$4,565.05 with interest, and that the mortgages described in the complaint be adjudged to be liens upon the property described therein for such sum, and that a judgment in foreclosure be rendered, as prayed for in the complaint.

It is thus apparent that there is a wide disagreement between these parties. The case is here for trial *de novo*, and the printed abstract contains 1,057 pages embracing about 175 exhibits and a great number of items of account, a great many of which are in dispute. Not only this, but the record, as is usual in such cases, contains a great mass of incompetent and irrelevant testimony, as well as much repetition. It is therefore quite apparent that this court cannot in this opinion review in detail the various items of account or the various contentions of the respective parties, and will content itself by a general statement of its conclusions from such examination of the record as it has been able to make.

As we understand appellant's counsel, they do not question respondents' right to an accounting from plaintiff as to all matters unaccounted for, but they insist that the record discloses that on July 15, 1903, the parties had a full, fair, and complete accounting of all transactions prior thereto, and hence that it was error to ignore such accounting and settlement, and to require plaintiff, nearly five years thereafter, to render to defendants an accounting of such prior transactions. Under the issues as they stood at the time such ruling was made, no fraud or mistake, such as would avoid such accounting and settlement, was claimed, but the sole question was whether the notes executed and delivered by Mary U. Pehrsson, or by her, Victor, and Lottie, and secured by the chattel mortgage given by them to the plaintiff on July 15, 1903, were

thus given without regard to the status of the account between the parties, and without any knowledge on defendants' part as to the actual indebtedness then existing. On the last day of the trial, defendants were permitted to interpose what they styled a "supplemental and amended answer," wherein fraud was charged on plaintiff's part in the various transactions between the parties. We are convinced that it was a palpable abuse of discretion to permit such change in the issues after such a long and expensive trial, especially in view of the very meager proof of fraud contained in the record. We shall therefore dispose of the case upon the pleadings as they stood throughout the trial.

The execution and delivery of the notes and mortgages described in the complaint having been expressly admitted in the answer, it necessarily follows that plaintiff established a *prima facie* right to the relief prayed for, by the introduction in evidence of said notes and mortgages, and the burden was cast upon defendants to establish the defensive matters pleaded by them. In other words, the burden was upon defendants to establish that the notes were given as accommodation notes merely, and that they do not represent actual indebtedness due from defendants to plaintiff at the time they were executed and delivered. And this is true, even conceding that plaintiff, during the various transactions between the parties, should be considered as standing in a fiduciary capacity towards defendants. *Montgomery v. Fritz*, 7 N. D. 348, 75 N. W. 266; *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053.

The record discloses that the transactions between these parties commenced in April, 1899, at which time it is conceded that plaintiff loaned to defendant Mary U. Pehrsson the sum of \$100, taking her note therefor. The next year she admittedly borrowed from plaintiff the additional sums of \$224.20 and \$387, giving to plaintiff her promissory notes for such amounts, secured by a chattel mortgage and an assignment of a contract for the purchase of certain real property. So that in the fall of 1900 defendant Mary U. Pehrsson was admittedly indebted to plaintiff in the sum of \$711.20 and interest. The evidence discloses that in 1901 many transactions took place between them involving both debits and credits in their account, and that on January 30, 1902, said defendant executed and delivered to plaintiff her note for \$766.72, secured by chattel mortgage. This note was no doubt given in lieu of the notes previously executed, and, after deducting the credit of \$42 indorsed thereon, represented the amount of the indebted-

ness due plaintiff at its date. That such is the fact is quite satisfactorily made to appear by the evidence, which is too voluminous to relate, but which discloses various settlements made from time to time. This conclusion is corroborated by the conceded fact that about this time Mrs. Pehrsson and her attorney, L. C. Johnson, sought a settlement and adjustment with plaintiff of all differences between them, and she and her said attorney computed the indebtedness to be about \$900; and they visited plaintiff's home for the express purpose of paying him the entire sum, taking with them for such purpose the sum of over \$1,100. No settlement was effected for reasons not here material to relate. It was shortly after this that Johnson ceased to have any further relations with the parties, and plaintiff assumed to take his place as an advisor and friend of the Pehrssons. Plaintiff continued thereafter to make advances to Mrs. Pehrsson, and to credit her account with various sums received by him up to August 5th of that year, at which time another settlement of the open account was made, and a balance struck in plaintiff's favor of \$12.62. Again, on January 3, 1903, a settlement of such open and running account was effected, and there was found to be a balance due plaintiff of \$286.58, which was paid by a note for said sum. Again, on July 15, 1903, the parties appear to have arrived at a full and complete settlement of all unsettled matters, as evidenced by Exhibit "N," at which time a balance was found due plaintiff on open account (excluding certain designated items), of the sum of \$1,312.50. Said exhibit is in Mrs. Pehrsson's handwriting, and consists of a detailed statement of the various items of debits and credits since the last settlement, and is signed by both her and the plaintiff. Not only this, but two notes were at that time executed and delivered by Mrs. Pehrsson, Victor, and Lottie, to plaintiff, for the exact amount of such balance thus agreed on, and these defendants also at such time executed and delivered to plaintiff their chattel mortgage securing the payment of these and all prior notes given to him. The two notes above mentioned are the notes for \$700 and \$612.50 respectively, and were postdated April 1 and June 1, 1903, for the evident purpose of equalizing the interest on prior advances. In the light of the evidence showing that these parties agreed upon a stated account between them on July 15, 1903, the presumption must be indulged that such stated account embraces all unsettled transactions up to that date, with the exception of those times expressly mentioned

as not included therein. It cannot be presumed that such settlement was made through any undue influence, fraud, or mistake. On the contrary, it must be presumed that such settlement was the free and voluntary act of the parties, and that the same was understandingly made, until the contrary is established by proof. The burden is on defendants of overcoming such presumption, and this they have failed to do. The fact of the execution and delivery of the notes and mortgages, taken in connection with the evidence of the agreed settlement, is very convincing proof in support of appellant's contention as to the status of the indebtedness on and prior to July 15, 1903, and we shall accept such proof as correct, except to the extent, if any, that defendants may have shown its incorrectness occasioned through mistake or otherwise. There is no sufficient proof of fraud on plaintiff's part, even if fraud were alleged, to substantiate respondents' contention in this respect; nor do we think the proof warrants a finding of any undue influence or duress practised by plaintiff on the defendants or any of them. While Mrs. Pehrsson is of Swedish nationality, and is not very proficient in the English language, we are convinced that she and her sons John and Victor were fully competent to understand the various business transactions between them and the plaintiff, and that they were able to, and did in fact, understand what they were doing in making the various settlements with and in giving to plaintiff the various notes and mortgages referred to in the record.

Respondents contend, however, that appellant has waived his right to rely upon the settlement of July 15, 1903, as *prima facie* evidence of the status of the account on that date, for the reason, as argued, that a full and complete accounting from the beginning was ordered by the trial court, to which ruling appellant failed to save an exception. The record discloses, however, that at the very commencement of the trial an exception was preserved to the ruling permitting the taking of what was designated preliminary proof upon the question of the right to an accounting at all. We think this was sufficient conceding that an exception was necessary to preserve appellant's rights, but we do not think any exception was necessary. The ruling or order referred to is in no manner binding on this court, which, under the statute, must try the case *de novo* upon the pleadings and evidence offered. The ruling in no respect changed the issues as originally framed by the parties, but such ruling merely amounted to an expression of the views of

the trial court upon the question whether plaintiff's concededly prima facie case had been overthrown so as to cast on him the burden of proving his case, the same as though no settlement had been made. Such conclusion was clearly erroneous and in no manner binding on this court. We shall, therefore, as above stated, assume that the status of the account on July 15, 1903, is as the parties then agreed upon, except in so far as defendants have shown the same to be incorrect as the result of mutual error, oversight, or mistake. Presumptively, therefore, the account on July 15, 1903, as settled, embraces all prior transactions, and on such date defendant Mrs. Pehrsson was indebted to plaintiff in the sum of \$3,014.80 and interest, as represented by the six promissory notes described in Exhibit 20, after deducting certain indorsements which concededly should be made thereon.

These notes are the following:

One dated January 30, 1902 .....	\$766.72
One dated April 1, 1902 .....	500.00
One dated May 15, 1902 .....	500.00
One dated January 3, 1903 .....	266.58
One dated April 1, 1903 .....	700.00
One dated June 1, 1903 .....	612.50

Total,	\$3,365.80
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There are indorsed on the first note the following payments:

On January 30, 1902 .....	\$ 42.00
On April 30, 1902 .....	309.00

Total	351.00
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\$3,014.80

Leaving a balance, as above stated, of \$3,014.80 with interest, presumably due on all of these notes in January, 1905, there being no contention that any payments thereon were made after July 15, 1903.

We have searched the record in vain for any evidence on defendants' part overthrowing the presumption aforesaid arising from the settlement made on July 15, 1903, and the giving of the promissory notes aforesaid. On the contrary, the testimony tends to show that such presumption is in accord with the facts. This conclusion, together with our previously announced holding, that it was error under the circum-

stances to permit an amendment of the answer, and that the cause must be disposed of on the issues framed by the original pleadings, necessarily operates to materially narrow the controverted questions in the case. We will now proceed to consider and determine the true status of the account from and after July 15, 1903.

Nothing was paid on any of the notes above described after July 15, 1903, and on January 27, 1905, there was due thereon, with interest, the aggregate sum of \$3,841.77. On November 2, 1903, two additional notes of \$500 each were given, and there was due on these notes on January 27, 1905, the sum of \$1,148.30, making a total sum due on said date, as represented by notes, of \$4,990.07, instead of \$5,077.28, as claimed by plaintiff. This difference is no doubt caused by plaintiff's computing interest on overdue interest, which we have not done.

In order to arrive at the exact sum due plaintiff on January 27, 1905, we must deduct the credit balances found to be due defendants on the open account between July 15, 1903, and January 27, 1905, together with interest on such balances to the latter date. It will serve no useful purpose to enter into details relative to the debits and credits in such open account, and we shall merely state our conclusions from the evidence. We find that defendants are entitled to credits for proceeds of grain in 1903, in the sum of ..... \$6,325.50 also for the two notes of \$500 each, dated November 2, 1903 1,000.00

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Total credits,	\$7,325.50
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We find that plaintiff advanced to and paid out for defendants during said year, and subsequent to July 15, sums aggregating .....	\$6,399.82
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Leaving a credit balance in defendants' favor of .....	\$ 925.68
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Defendants are entitled to interest on this balance from November 1, 1903, to January 27, 1905, being .....	\$ 137.92
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making a total credit balance of .....	\$1,063.60
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In 1904 plaintiff received as proceeds of grain the sum of	\$3,730.91
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Proceeds of sale of S. W. $\frac{1}{4}$ , section 3 .....	574.31
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Defendants are also entitled to credit for the discount on note paid to Red River National Bank .....	218.90
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Total credits due defendants for 1904,	\$4,524.12
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During 1904 defendants should be indebted with sums aggregating .....	\$4,813.48
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Leaving a net balance in plaintiff's favor for 1904 of ....	\$ 289.36
During January and February, 1905, plaintiff made advances aggregating the sum of .....	\$ 412.76
He should be debited on February 1st with proceeds of loan	1,197.13
After deducting the net balances aforesaid of \$289.36 and \$412.76 .....	702.12

it leaves a net balance in defendants' favor of .....	\$ 495.01
After deducting these net balances of \$1,063.60 and \$495.01 from the amount of such notes, it leaves a balance due thereon of .....	\$3,431.46
Interest thereon to January 1, 1906 .....	377.46
Note given in July, 1905 .....	1,000.00
Interest thereon from November 1, to January 1 .....	20.00

Total face value of all notes on January 1, 1906	\$4,828.92
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From February 28, 1905, to January 1, 1906, defendants should be debited and credited on the open account as follows:

To cash advanced with interest .....	\$2,872.93
Credits	
By proceeds of grain and stock .....	\$2,757.88
By note given in July .....	1,000.00
	3,757.88

Net balance in defendants' favor .....	\$ 884.95
Interest thereon to January 1 .....	43.00

Total	\$ 927.95
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Deducting this sum from the notes leaves a balance due plaintiff on January 1, 1906, of ..... \$3,900.97

The transactions between the parties during the years 1906 and 1907 relate wholly to the contract, Exhibit 36, by which contract plaintiff sold to defendant Mrs. Pehrsson, on the crop payment plan, the N. E.  $\frac{1}{4}$  of section 33. Those transactions are not within the issues in the case at bar. Hence we are in no way concerned in this litigation with

such transactions. Our conclusion from a consideration of the whole record is that defendants Mary, Lottie, and Victor are indebted to the plaintiff in the said sum of \$3,900.97 with interest thereon from January 1, 1906, at the rate of 12 per cent per annum; that such sum is a lien upon the property described in the chattel mortgage mentioned in the complaint, and the plaintiff is entitled to a foreclosure of such chattel mortgage, as prayed for in his complaint.

It is contended in behalf of defendant Lottie E. Pehrsson, that she was, at all the times mentioned in the complaint, mentally unsound and incapable of entering into a binding contract. We have duly considered such defense, and are of the opinion that she has failed to establish the same. Section 4018, Rev. Codes 1905, provides: "A person entirely without understanding has no power to make a contract of any kind. . . ." Section 4019 reads: "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission of this Code." Applying these statutory tests, which are merely declarations of the common-law rule, it is apparent from the testimony that such defendant had sufficient understanding to enable her to enter into a binding obligation.

But one other question remains for determination. By the will of Gustaveus A. Pehrsson, husband of Mary U. Pehrsson and father of the other defendants, the executrix was directed on or before a certain date to sell all of his real property, and the proceeds thereof were to be distributed among the children upon their reaching their majority. Such provision operated as an equitable conversion of such real property into personalty, from the date of the testator's death, for the purpose of its administration.

Penfield v. Tower, 1 N. D. 223, 46 N. W. 413; Hagen v. Sacrisson, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518. In view of this, did the defendants who executed the real estate mortgage, by so doing, hypothecate, as security for this indebtedness, their respective interest in such estate (to the extent of the proceeds of such real property), whatever such interests may be? That such question requires an affirmative answer is, we think, reasonably clear. Equity looks not to the mere form of an instrument, but beyond this, to its substance, and to the apparent object and purpose of the parties in executing it, and will give

effect thereto, when possible, in order to carry out such object and purpose. It is perfectly apparent that these defendants who signed such instrument intended thereby to hypothecate their respective interests in such estate, and this court, in accordance with settled rules of equity jurisprudence, must give effect thereto. *Standorf v. Shockley*; 16 N. D. 73, 11 L.R.A.(N.S.) 869, 111 N. W. 622, 14 A. & E. Ann. Cas. 1099; *Horst v. Dague*, 34 Ohio St. 371; *Re Ledrich*, 68 Hun, 396, 22 N. Y. Supp. 978.

Plaintiff is therefore entitled to judgment against defendants Mary, Lottie, and Victor Pehrsson, as prayed for in the complaint, and in conformity with the views above expressed; but as to the other defendants, no cause of action having been established against them, it is adjudged that the action shall be dismissed with costs. As between the other parties, each shall pay his own costs, except as to the expense of printing the abstract, one half of which may be taxed against the defendants against whom judgment is ordered.

The District Court is directed to vacate the judgment appealed from, and to enter judgment as herein directed.

All concur, except MORGAN, Ch. J., not participating.

Goss, J., being disqualified, did not sit on the hearing of this case, W. C. CRAWFORD, Judge of the Tenth Judicial District, sitting in his place by request.

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## HENRY WIEMER v. ALLIE D. WIEMER.

(130 N. W. 1015.)

### Practice — Divorce — Vacating Judgment.

1. The remedy of a party aggrieved by a decree of divorce, if the evidence is insufficient to sustain such decree, is not ordinarily a motion to vacate, but by appeal.

### Divorce — Collusion.

2. "Collusion is an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." (§ 4058, Rev. Codes 1905.) The

evidence in this case failing to show any agreement between the husband and wife, that one of them should commit, or appear to have committed, acts constituting a cause for divorce, and it not appearing that the defendant was represented as having committed acts for such purposes which she had not committed, no collusion is shown.

**Divorce — Collusion.**

3. The representation referred to, in order to constitute collusion, must be a misrepresentation.

**Divorce — Vacating Judgment — Motion of Applicant.**

4. In applications to vacate a decree of divorce entered against the applicant under the circumstances of this case, it must appear that she is acting with good motives, and not for an increase of advantage to her.

Opinion filed April 1, 1911.

Appeal from District Court, Burleigh county; *Winchester, J.*

Action by Henry Wiemer against Allie D. Wiemer. From an order denying a motion to vacate a decree of divorce rendered in the case, defendant appeals.

Affirmed.

*Engerud, Holt, & Frame*, for appellant.

A judgment fraudulently obtained will be set aside. 1 Black, Judgm. 320; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *Crouch v. Crouch*, 30 Wis. 667; *True v. True*, 6 Minn. 458, Gil. 315; *Young v. Young*, 17 Minn. 181, Gil. 153; *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460; *Daniels v. Benedict*, 50 Fed. 351.

A judgment of divorce collusively obtained will be set aside. Rev. Codes, §§ 4056, 4058; *True v. True*, 6 Minn. 458, Gil. 315; *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621; *Danforth v. Danforth*, 105 Ill. 603; *Singer v. Singer*, 41 Barb. 139.

*Stevens & Berndt*, for respondent.

A judgment will not be vacated on mere suspicion of fraud, but there must be clear and strong evidence. 23 Cyc. Law & Proc. p. 920, and note 69.

SPALDING, J. This is an appeal by the defendant from an order of the district court of Burleigh county, denying defendant's motion

to vacate the decree of divorce in said action. The motion was based upon the ground that it was fraudulently and collusively procured.

Plaintiff and defendant were married in Illinois in August, 1905. At the time of such marriage she was a widow, with a daughter about ten years old. This daughter was formally adopted by the plaintiff after such marriage with defendant. They resided in Illinois until the early part of 1905, when they moved to land owned by the plaintiff in Kidder county, North Dakota. In July, 1906, the defendant went to Montana, and remained there until fall, when she returned to Peoria, Illinois, her former home. In July, 1907, plaintiff brought this action for divorce on the alleged ground of desertion. The defendant answered, and the suit came to trial October 31, 1907, at Bismark. Plaintiff submitted his case in chief, and the defendant herself testified on the defense, when counsel for plaintiff requested a continuance of the case for sixty days to permit the taking of further testimony. The evidence as to what transpired subsequent to this request for adjournment is in sharp conflict. The appellant submits a long affidavit containing her version, which, if true, shows that she was alarmed lest the respondent obtain the custody of her daughter, and that, on the representations of her counsel that plaintiff might and probably would succeed in obtaining such custody, she refrained from submitting further evidence, and made a settlement with her husband, accepting \$2,000 denominated in the judgment, "alimony, and for the maintenance of the daughter," and that the court thereupon entered its decree whereby a divorce was granted to the respondent. She affirms that, except for her fear of losing the custody of her daughter, and misrepresentations by her counsel, and lack of knowledge of law on her part, she would not have abandoned her defense. Her affidavit is to some extent corroborated by the affidavit of the child.

Her counsel was Joseph W. Walker, of Steele, who is a reputable officer of this court, and his affidavit is submitted, and in many respects it is in direct conflict with the statements of the appellant, and explains, in an apparently frank and reasonable manner, the transactions which occurred, and which led to her abandonment of any defense. It is unnecessary to set forth in detail the contents of these affidavits.

It is elementary that fraud must be clearly proven, and we think the district court was justified in finding, on the application to vacate the decree, at least that the charges of fraud were not sustained with that

degree of clearness necessary to warrant the vacation of a solemn decree of that court entered in an action for a divorce. It appears that a motion for a new trial was made and denied, and no appeal taken from the order denying it; neither was an appeal taken from the judgment; and it is contended that the facts disclosed by the evidence before us and the affidavits of the parties establish collusion, and that the decree should have been vacated on this ground.

The last appearance of the appellant in the district court was in opposition to the granting of the decree. Before the court again convened she changed her mind. The record contains no evidence or claim that she had any interview with the respondent or his attorney. The affidavit of Walker recites that appellant asked him if he believed the court really would grant the continuance; that he informed her that in cases of this kind courts generally desired to be informed of the facts to the utmost extent, and that they probably would not be in position to successfully resist such a motion upon a showing by plaintiff of the materiality of the testimony that he expected to obtain from absent witnesses; that the defendant then told him that all the witnesses named were bitter enemies of hers, who would, by their testimony, directly contradict her own most material testimony, and that she herself could not procure more than one witness to support her side of the case, and that she could not depend upon the testimony even of that one as being of much assistance; that he then advised her that up to the time of the respondent's notice of his proposed motion, he had felt sanguine of preventing the plaintiff from winning in the case, but that, in view of defendant's inability to procure evidence in support of her own testimony, and in view of such an array of witnesses who would contradict her, it appeared, then, as though it would be next to impossible to prevent plaintiff from getting his decree; that thereupon appellant replied to him that it looked as though she might be thrown out without means of support; that she was tired of the fight; and that subsequently, and in the evening of November 1, 1907, the attorney for plaintiff had a conference with him with reference to the witnesses whose testimony was to be secured, and that at such conference he asked such attorney whether it would not be possible to so adjust matters that plaintiff would dismiss this suit, and defendant a similar suit which she had pending in Illinois, and that a discussion between them was then had regarding the amount of alimony that might be ultimately agreed upon in such case and in the

event of a decree for the plaintiff, and that it was finally agreed that \$2,000 might be considered by both parties to said action. Walker testifies that he then called upon the defendant at her room, and informed her fully and truly as to his interview with the opposing counsel, whereupon she expressed herself as highly pleased thereat, and directed him to drop the fight provided she would be paid \$2,000 alimony and given the custody of the daughter; that the next morning she saw him and requested him to see the opposing counsel, and that she stated that she wanted to settle the suit at once. He relates other facts not material to this proceeding, tending to show that he fully and honestly informed her at all times regarding the different steps in the proceedings, and that she did not further appear on the trial, and that she was paid the \$2,000 by the respondent, but subsequently loaned him \$1,000 thereof, taking security therefor.

The affidavit of Walker also sets forth certain correspondence passing between him and the appellant during the months of November and December, 1907, and January, 1908, indicating her satisfaction with his conduct of the case and with the result, suggesting, however, in one letter, that she contemplated taking further proceedings, contrary to the advice of her Illinois attorney, and that she thought she did not get as much as she ought to have received from the respondent.

It appears that after the decree was entered, certain exhibits were destroyed by agreement, and we are not advised definitely as to their nature. Aside from them the evidence submitted, and on which the decree rests, is before us. If it is insufficient in law to sustain the decree, appellant's remedy is not ordinarily by motion to vacate the decree, but by appeal. We, however, suppose it is here for the purpose of supporting the claim of collusion, on the theory that it does not disclose a cause of action in favor of the respondent. Prima facie it does not do so, but, when taken in connection with what appears in the proceedings in an action that she had brought in Illinois for a divorce, and which would go largely to the intent of the appellant when she left Kidder county for Montana, as to returning to or deserting the respondent, the trial court may have been warranted in making its findings on which the decree rests. However this may be, the evidence of collusion is not so convincing that we feel justified in reversing the order of the district court.

Usually the fact of an agreement not to make a defense is only evidence tending to show collusion, and is not collusion, and whether col-

lusion does exist must usually be determined by a consideration of such agreement and the other facts and circumstances surrounding it. In the case at bar we cannot say that an agreement was made that a decree should be entered irrespective of the law and the facts; neither can we say that the court was misled by representations in court that the appellant had committed acts constituting a cause of divorce, for the purpose of enabling the respondent to obtain a divorce. Section 4058, Rev. Codes 1905, defines collusion as "an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." There is no claim that it was agreed between the appellant and respondent that the appellant should commit, or appear to have committed, an act constituting a cause for divorce. The evidence submitted to the court on which the decree was entered must be accepted as stating the facts regarding their separation. The representation of such acts as having been committed, when made to the court, must, to constitute collusion, be a misrepresentation, that is, an agreement to misrepresent the facts, or, more clearly, misrepresentation in court by agreement, which makes it appear that acts constituting a cause for divorce have been committed by the defendant when such acts have not been committed. In the case at bar the court may have been mistaken in the legal effect of the acts which were shown. If we assume that the evidence did not disclose a cause for divorce, he must have been so mistaken. But the evidence was before him, and it is not disclosed in the present proceeding that it was untrue, or that it was made by any agreement of the parties. In fact, the contrary appears. The agreement, if it can be termed an agreement, related wholly to property rights, and the obligations of the respondent toward the adopted daughter. *Burgess v. Burgess*, 17 S. D. 44, 95 N. W. 279. See also *Karren v. Karren*, 60 L.R.A. 294, and note (25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465).

In addition to the reasons above stated, from a consideration of all the evidence submitted on the motion to vacate the decree, it is clear to us that the appellant, in making such motion, was not actuated by proper motives or proceeding in good faith. It is perfectly clear that at the time the decree was entered, and for some days thereafter, even after consulting with her Illinois attorney, she was eminently satisfied with the outcome of the suit, but that, on consulting with another attor-



ney in Illinois, she concluded she had not received as much property in the settlement as she should have obtained. She so states in a letter to Walker, and we are convinced that therein lies the secret of this application and of her motive in making it. It was for her to make it appear that she was acting with good motives, and not from any increase of advantage that she hoped or expected to gain thereby. *Singer v. Singer*, 41 Barb. 139. She did not return the \$2,000 to the respondent, but it was tendered into court. It is not beyond her recall, even in case the order appealed from should be reversed, and this is an important fact.

The order is affirmed.

All concur, except, MORGAN, Ch. J., not participating.

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## F. A. PATRICK & COMPANY v. HERMAN NURNBERG.

(131 N. W. 254.)

### **Appeal and Error — New Trial — Verdict — Evidence.**

1. Where no motion for new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed.

### **Appeal and Error — Statement of Case — Specification of Errors.**

2. Where no specification of error is incorporated in the statement on appeal, the statement will be disregarded.

### **Appeal and Error — Absence of Motion for New Trial and Specification of Errors — Review on Judgment Roll.**

3. Where no motion for new trial was made, and no specification of error incorporated in the settled statement of the case, this court disregards the statement settled, and will not review the evidence or rulings thereon during the trial, and reviews only the errors apparent from the judgment roll.

### **Depositions — Reduction to Writing — Certificate — Error Without Prejudice.**

4. A motion to suppress a deposition on the ground that the certificate there-to does not state that the deposition was reduced to writing, or name the person reducing it to typewriting, should be denied in the absence of some showing of prejudice in support of the motion.

### **Depositions — Presumption of Regularity — Rebuttal — Evidence.**

5. A presumption in favor of regularity of taking deposition, and proper performance of duty by the officer taking same, applies in the absence of proof to the contrary; and the burden to rebut such presumption is upon the party seeking to suppress the deposition.

**Depositions — Presumption of Regularity — Certificate.**

6. In the absence of proof it will be presumed the officer taking the deposition, or the witness testifying by deposition, reduced the same to writing, and the testimony may be examined to supplement the officer's certificate in such respect.

Opinion filed April 7, 1911. Rehearing denied May 6, 1911.

Appeal from District Court, Stutsman county; *Burke*, Judge.

Action by F. A. Patrick & Company against Herman Nurnberg. Judgment for plaintiff, and defendant appeals.

Affirmed.

*John U. Hemmi*, for appellant.

Motion to suppress before jury is called is in time. *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Anderson v. First Nat. Bank*, 6 N. D. 497, 72 N. W. 916.

Substantial compliance with law as to certificate to deposition is required. 13 Cyc. Law & Proc. pp. 943, 944, 981.

Incompetent evidence in a deposition may be excluded at trial. *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194.

*Oscar J. Seiler* and *A. W. Aylmer*, for respondent.

Unless assignments of error refer to proper folios of abstract, they will not be noticed. *McLaughlin v. Thompson*, 19 N. D. 34, 120 N. W. 554; *State v. School Dist. No. 50*, 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555; *Flora v. Mathwig*, 19 N. D. 4, 121 N. W. 63; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531.

Substantial compliance with law in certifying depositions is all that is required. 4 Enc. Ev. p. 440 (B) 82; 13 Cyc. Law & Proc. p. 952 (17) 34; *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Ueland v. Dealy*, 11 N. D. 529, 89 N. W. 325.

*Goss, J.* Defendant appeals from a judgment rendered against him in the district court of Stutsman county. This action is for money only, brought for goods sold and delivered, and was tried to a jury. No motion for new trial, as required by § 7226 of the Revised Statutes of North Dakota for 1905, was ever made or brought on for hearing, and therefore the sufficiency of the evidence to support the verdict cannot be inquired into. Nor was any specification of error embodied in or settled as a part of the statement of the case, as provided by § 7058, N.

D. Revised Statutes 1905, and the statement should be wholly disregarded. Consequently, there is but little before this court for review, as the errors urged are to matters occurring during the trial in the admission of testimony, no error based on the judgment roll being alleged. *Jackson v. Ellerson*, 15 N. D. 533, 108 N. W. 241; *Bertelson v. Ehr*, 17 N. D. 339, 116 N. W. 335; *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310, 116 N. W. 333; *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276.

However, as the error complained of consists of the court's refusal to suppress a deposition, we will pass upon that matter. Appellant questions the sufficiency of the certificate of the notary authenticating the deposition. Our statute (§§ 7284, 7285) regulates the authentication and certification of depositions. The deposition in question was taken pursuant to legal and sufficient written notice, and at the time and place designated in the notice, and was subscribed by the witness in the presence of the officer certifying thereto, after the witness was duly sworn to testify the truth; all of which appears from the certificate of the notary taking such deposition. But such certificate omits to certify that the deposition was reduced to writing by some proper person, and omits to name the person so reducing the deposition to writing, failing to comply with subdivision 2 of § 7285 of the Revised Statutes of 1905. The deposition was in all other respects properly taken and certified. It had been filed with the clerk more than a month prior to the trial, without exceptions being filed thereto. After the term of court at which the case was tried had been in progress for a period of eight days, defendant's counsel filed written exceptions to the depositions, asking their suppression because of the failure of the certificate to conform to the statutory requirements in the particulars above recited. Such objections were brought to the attention of the court at the time the case was called for trial, when the court overruled the motion then made for the suppression of the deposition. There is some question whether the motion to suppress was brought on for hearing before the trial of the case was actually begun, but we will take it for granted the written objections taken and motion to suppress transpired before the commencement of the trial, and determine whether the omission of the certificate to state that the deposition was reduced to writing by some person named therein necessarily requires the suppression of the deposition, in the absence of any showing of prejudice result-

ing from noncompliance with the statute. This question of practice should be settled, and we pass upon it.

The statute quoted prescribes the rules under which depositions may be taken, and designates that "the officer taking the deposition shall annex thereto a certificate showing the following facts: . . . (3) that the deposition was reduced to writing by some proper person, naming him." Notwithstanding the language of the statute is mandatory, the statute is one regulating civil procedure, and is construed to be directory, as similar statutes are usually interpreted to be when providing a method or manner only of procedure, in the absence of some strong reason for a contrary construction. A substantial compliance with the statute is all that is required, and in determining such compliance the court is not limited to the officer's return, but may supplement it by anything appearing in or from the deposition itself. Accordingly, while the certificate did not state that the deposition was reduced to writing by some proper person named, the deposition shows for itself that it was reduced to writing, or rather, was typewritten. The presumption then applies that either the notary taking the deposition or the witness so testifying reduced the deposition to writing; in either of which cases had the certificate so recited, the deposition would not, because thereof, be subject to attack, as either the notary taking the deposition or the witness himself would be a proper person to reduce the deposition to writing. The presumption in favor of regularity of proceedings, and proper performance by the officer of his duties in taking the deposition, also applies in the absence of evidence by notarial certificate or otherwise to the contrary; and the burden is on the party moving to suppress the deposition to overcome such presumption, otherwise the presumption applies and establishes the admissibility of the deposition. The following cases are the holdings of the various states having statutes similar to ours on this same question:

*Imboden v. Richardson*, 15 La. Ann. 534, held "that the presumption of law is that the magistrate did his duty, and that the answers were written either by himself or by a person not interested in the event of the suit, and that the burden of proof was on the party objecting to rebut this presumption." And *Blair v. Collins*, 15 La. Ann. 683, to the effect that "it is not necessary that it should appear by whom the deposition was written." See also *Horton v. Arnold*, 18.

Wis. 213; *Winton v. Little*, 94 Pa. 64, that "it is to be presumed that the depositions were properly reduced to writing, and subscribed by the witnesses, until the contrary was shown," and, the certificate not reciting such facts, the presumption applied, following *Piper v. White*, 56 Pa. 90, in which the certificate had the same omission as in the case on trial; and the court said: "It must be presumed that the deposition was correctly taken and reduced to writing by the justice or on his authority." Also *Barron v. Pettes*, 18 Vt. 385, in which the court considers the act of taking the deposition by the magistrate "as prima facie evidence both of its official character and the regularity of the proceedings." And *Jolliffe v. Collins*, 21 Mo. 338, to the effect that a certificate to a deposition that it was reduced to writing in the presence of the witness, and subscribed in the presence of the officer, is sufficient, although it omits to state that it was reduced to writing in the presence of the officer, as required by the statute. And also *Turner v. Hardin*, 80 Iowa, 691, 45 N. W. 758, and *Cook v. Gilchrist*, 82 Iowa, 277, 48 N. W. 84, holding "the burden is upon the party attacking the deposition to show that the party reducing the same to writing was interested in the event of the action as the attorney or agent of the opposite party;" to the same effect is the decision of our own court in *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607, and cases cited therein. See also *Ueland v. Dealy*, 11 N. D. 529, 89 N. W. 325, to the effect that "this court has applied the rule that a purely technical objection to a deposition should be overruled in the absence of any claim of prejudice," following *Moore v. Booker*. To the same effect is *Burrill v. Watertown Bank & Loan Co.* 51 Barb. 105; *Cheney v. Woodworth*, 13 Colo. App. 176, 56 Pac. 979.

Where the depositions as a whole, including the answers, construed with the certificate authenticating them, show a substantial compliance with the statute, the deposition will not be suppressed. *Missouri, K. & T. R. Co. v. Denton*, 29 Tex. Civ. App. 284, 68 S. W. 336; *Thrasher v. Ingram*, 32 Ala. 645, holding a similar statutory provision to be "a general direction to the commissioner as to rules to be observed by him" in taking a deposition, and directory; and that the answers given by the witness supplement the certificate of the officer to the depositions to the effect that both the answers and the certificate may be considered in determining the manner of the taking of the deposition, and this even when the statute required the certificate of the com-

missioner should affirmatively show that the statute has been complied with in each and every particular as to the manner of taking of the deposition. We quote from this opinion: "We adopt this construction the more readily because we can perceive no possible good that can come of the more rigid construction. The commissioner who would be either ignorant or corrupt enough to permit answers to be improperly written down would be equally liable to authenticate them with a formal certificate." This reasoning applies with full force. The same tendency is apparent in the later United States decisions showing that those courts depart from the former strict construction of the statute and Supreme Court rules, under which depositions to be admitted formerly had to comply rigidly with the statute and court rule under which they were taken. See *Egbert v. Citizens' Ins. Co.* 2 McCrary, 386, 7 Fed. 47; *Keene v. Meade*, 3 Pet. 1, 7 L. ed. 581.

A substantial compliance with the statute prescribing the manner of taking and the certification of depositions is all that is generally required. See 6 Enc. Pl. & Pr. pp. 544, 545; 13 Cyc. Law & Proc. pp. 952-973; and 4 Enc. Ev. p. 440. See also 16 Century Dig. cols. 1146-1151.

The foregoing and all of the authorities are to the effect that on a motion to suppress a deposition, in the absence of a showing of prejudice, or facts from which prejudice may be presumed, or some reason affirmatively appearing other than the enforcement of technical rule of court or statute, a deposition will not be suppressed. The suppression of evidence otherwise admissible is not regarded with favor by courts and similar tribunals. The policy of the law in prescribing statutory or rule of court requirements in such matters should be construed in connection with the purpose for which they are prescribed; that is, to require uniform procedure in perfecting and presenting proof, at the same time so surrounded by safeguards as to prevent false or manufactured testimony being offered or ready opportunity therefor be afforded.

We conclude the certificate to the deposition was sufficient, and the ruling of the court correct. The judgment of the trial court is accordingly affirmed.

All concur, except MORGAN, Ch. J., not participating.

BURKE, J., being disqualified, HON. CHAS. A. POLLOCK, Judge of the Third Judicial District, sat by request.

**J. H. HART and Grant Springer v. THE VILLAGE OF WYNDMERE**, in Richland County, North Dakota, W. D. Springer, Treasurer of the Village of Wyndmere, J. I. Hanson, Neil Campbell, and Lars Olsgard, Trustees of the Village of Wyndmere, Defendants and Respondents, and North Dakota Artesian Well Company, a Corporation, Defendant and Appellant.

(131 N. W. 271.)

**Municipal Corporations — Village Warrants— Sale — Warranty.**

1. A seller of village warrants for value, by their sale, impliedly warrants such securities to be the genuine and legal obligations of the village, and that the same are not to the knowledge of the transferrer subject to set-off or counterclaim.

**Municipal Corporations — Payment in Warrants — Payment in Cash — Contract Obligation.**

2. The delivery by a village of its legal warrant in payment of a contract providing for payment by it in cash is payment of such contract obligation.

**Municipal Corporations — Persons Dealing Presumed to Know Powers — Nature.**

3. Those dealing with a municipal corporation, a village, are presumed to know the extent of its powers, and cannot hold it liable because of representations or contracts of its officers concerning matters not legally within its corporate powers.

**Actions — Change from Equitable to Legal — Jury.**

4. An action begun as an equitable action may, by subsequent pleadings, be changed in nature to one at law properly triable on demand to a jury.

**Parties — Submission to Jurisdiction of Court — Waiver — Additional Defendants.**

5. Where summons and complaint were issued and served in an action against a single defendant, and thereafter the parties stipulate in additional defendants by the service of supplemental pleadings, naming them as such, and such additional defendants so named voluntarily enter the action, serve answers on codefendants and original plaintiff, and issue is joined thereon between the original plaintiff and all of such defendants and between one another, without an order of court bringing in such additional parties, but thereafter all parties to the action participate in the trial, offering their testimony, resting, and moving for judgment, any objection thereafter made by such additional parties to the jurisdiction of the court over them, or the subject-matter of the action, comes too late, and they will be held to have submitted in all things to the jurisdiction of the court the determination of their action, and are bound by the verdict rendered and judgment entered thereon.

**Action — Change from Law to Equity — Joinder of Parties — Effect.**

6. If such action between the many parties, even though of conflicting interest, is but a combination of two or more separate actions at law, the action is not necessarily changed from one at law to one in equity, because of such voluntary consolidation of issues by the parties.

**Statutory Construction — Verdict — Signature of Foreman of Jury — Trial.**

7. The statutory provision, § 7031 of the North Dakota Revised Statutes of 1905, requiring that a verdict must be signed by the foreman of the jury, is directory, not mandatory, and an unsigned verdict properly rendered and received that would otherwise be valid is not invalidated by such statutory provision.

**Appeal and Error — Review — Error Without Prejudice.**

8. Where, at the close of the testimony as to certain issues in the case, the court might have directed a verdict or findings, any error not affecting the result as to such matters, uncontroverted by the evidence, or any issues to be found by the jury, is error without prejudice, and not ground for new trial.

**Evidence to Sustain Verdict — Municipal Corporation.**

9. Evidence examined and held sufficient to sustain the verdict rendered, and judgment ordered thereon.

Opinion filed April 7, 1911.

Appeal from District Court of Richland county, *Allen, J.*  
Affirmed.

*C. W. Davis*, for appellant.

Only special questions arising from the pleadings, and controverted in the evidence, should be included in a special verdict. *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816.

Verdict should be signed by the foreman. Rev. Codes 1905, § 7031.

Jurisdiction cannot be conferred by consent; it must be acquired under statutory process, or order of court pursuant to the statute. *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221; *Ayers, W. & R. Co. v. Sundback*, 5 S. D. 31, 58 N. W. 4; *Woodward v. Stark*, 4 S. D. 588, 57 N. W. 496; *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296; *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616; Rev. Codes 1905, §§ 6824–6826.

*Wolfe & Schneller*, for respondents.

The transferrer of a chose in action warrants: A. That he has title.  
B. That it is not spurious, false, or counterfeit, C. When it is in writ-



ing, that there are no payments except as advised, and no legal offset because of any act of his. *Giblin v. North Wisconsin Lumber Co.* 131 Wis. 261, 120 Am. St. Rep. 1040, 111 N. W. 499; *Scott v. Hix*, 62 Am. Dec. 458, and notes, 2 Sneed, 192; *French v. Turner*, 15 Ind. 59; *Delaware Bank v. Jarvis*, 20 N. Y. 226, and cases cited; *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78.

When parties litigated with consent of all concerned in the action, jurisdiction was absolute and complete; Rev. Codes 1905, § 6850; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037; *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403; *Boyd v. Wallace*, 10 N. D. 78, 84 N. W. 760; 3 Cyc. Law & Proc. pp. 515, 516, and notes; *Ayers, W. & R. Co. v. Sundback*, 5 S. D. 31, 58 N. W. 4; *Blades v. Des Moines City R. Co.* 146 Iowa, 580, 123 N. W. 1057; *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221, rehearing in 17 S. D. 311, 96 N. W. 132.

No signature to a verdict is necessary. 22 Enc. Pl. & Pr. p. 897; *Miller v. Mabon*, 6 Iowa, 456; *Morrison v. Overton*, 20 Iowa, 465; 22 Enc. Pl. & Pr. p. 898.

*W. S. Lauder*, for respondents, Village of Wyndmere and its officers.

Goss, J. This action was begun by the plaintiffs and respondents herein against W. D. Springer as treasurer of the village of Wyndmere as sole defendant, in which action a summons and verified complaint dated June 26, 1906, was issued and served upon the defendant therein named. The action was an equitable one asking for injunctive relief against the treasurer paying warrants and claims registered after the two warrants owned by plaintiffs, to the effect that the funds of the village be accumulated to meet the two warrants, aggregating \$784.50 and interest, belonging to the plaintiffs. Accompanying the summons and complaint was an affidavit reciting substantially the same matters as the complaint, with the same statutory recitals as contained in the complaint as a basis for an injunctive order pending suit. Based upon the summons, complaint, and affidavit was an injunctive order enjoining the treasurer from making payments of claims and warrants registered subsequently to those of the plaintiff. As a result of the injunctive order, the funds of the village of Wyndmere accumulated in its treasury, and, nearly a year thereafter, the warrants remaining unpaid, the village having employed counsel in

21 N. D.—25.

behalf of itself, trustees, and the defendant treasurer, a supplemental complaint was served, reciting the reason therefor to be that of an agreement between the counsel for plaintiff and defendants, which supplemental complaint was entitled against W. D. Springer as treasurer of the village of Wyndmere and its trustees, naming them, and the North Dakota Artesian Well Company, a corporation, all named as defendants; and which complaint changed the entire nature of the action from one in equity to one at law. This supplemental complaint recited the ownership of the warrants as in the plaintiffs; that the same had been presented for payment long prior thereto, and were wholly unpaid; that funds had accumulated in the treasury of the village of Wyndmere amply sufficient to pay the same in full; that the plaintiffs were informed that the village had a defense to the payment of said warrants, and claimed the invalidity of the same. It further alleged that the warrants were indorsed to plaintiffs by the North Dakota Artesian Well Company, defendant, and that the plaintiffs purchased the warrants from said company for a valuable consideration, and that said company at the time of the purchase thereof by plaintiffs guaranteed said warrants were in all things genuine and the enforceable obligations of the village of Wyndmere, and that there existed no set-off, counterclaim, or legal defense against said warrants, or either of them, on the part of said village. But that said village claimed a set-off or counterclaim against the warrants to the full amount of the same. The supplemental complaint further recited that the defendants, village of Wyndmere and its trustees, and the North Dakota Artesian Well Company, for the purpose of avoiding further litigation and to the end that the rights of all the parties might be determined and adjudicated in this action, were willing to be joined as parties defendant, to litigate herein their respective rights, and that the plaintiff was willing they should be so joined and so litigate fully the matter on the merits by this one action. And judgment was asked for against the village of Wyndmere and the North Dakota Artesian Well Company for the amount of said warrants with interest thereon; and that the treasurer of the village of Wyndmere be ordered and directed to pay the said judgment from the funds in his hands, against which said warrants were drawn.

To this supplemental complaint the defendant village, its treasurer, and trustees answered, accepting and admitting service of said sup-

plemental complaint, and in its behalf set forth in detail its defenses to the payment of said warrants. This was substantially to the following effect: That the village of Wyndmere was not indebted to the defendant well company or the plaintiffs in any sum whatever; further that on December 8, 1905, said well company entered into a written contract with defendant village to dig, drill, sink, and construct for the village an artesian well, for the consideration and upon the terms and conditions as set forth in a contract, the portions material to this inquiry being:

"This agreement made and entered into this 8th day of November, A. D. 1905, by and between the North Dakota Artesian Well Company, a corporation of the state of North Dakota, located at Oakes, North Dakota, party of the first part, and the village of Wyndmere, North Dakota, party of the second part:

Witnesseth, That the party of the first part agrees and contracts with the said party of the second part, as follows:

First. On or about November 18th, 1905, to commence work on an artesian well to be located on village property in Block 7 in said village of Wyndmere, said land being the property of the party of the second part, and to prosecute the work thereon continuously and without unnecessary delay until said work is finished.

Second. To drill said well to a depth necessary to obtain a flow of water sufficiently clear for domestic and stock purposes. Striking quartzite or granite shall be considered proof of sufficient depth to fill this contract.

Sixth. For and in consideration for the drilling and casing of said well, said party of the second part agrees to pay the party of the first party the sum of \$1.50 per foot for entire depth of well, to be paid in cash at completion of well. . . .

Eighth. Party of the first part guarantees the well not to choke or clog for a period of one year from date of completion, but only on condition that the well is not used for power purposes, and that the flow of water from well is not checked by valves or mechanical contrivances, except upon permission of the party of the first part. In case the well should stop before that time, party of the first part will repair same or drill a new well, free of expense to the party of the second part. This guaranty, however, is null and void unless the well is settled for according to this contract."

The village, by way of answer, also alleged that the said company had failed, neglected, and refused to dig, drill, or construct an artesian well within the terms and conditions set forth within the written contract, in that said company neglected to drill said well to a depth necessary to obtain a flow of water sufficient for domestic and stock purposes, and that said company has never drilled or constructed any well for said village from which water sufficiently clear for domestic and stock purposes was obtained, but that the flow from the well constructed under the foregoing contract was at all times dirty and full of impurities, and at all times wholly unfit for domestic or stock use; and that said well was settled for by the village of Wyndmere in compliance with the terms of said contract, in anticipation that the well company would thereafter comply with the terms of its contract by digging for the village an artesian well furnishing a flow of water sufficiently clear for domestic and stock purposes. Said answer of the village and officers further alleges that on the failure of the well dug, for which the warrants were given, the well company, on February 4, 1907, entered into a further written contract as follows, to wit:

"This agreement, made and entered into this 4th day of February, 1907, by and between the North Dakota Artesian Well Company, a domestic corporation, party of the first part, and the village of Wyndmere, North Dakota, party of the second part,

Witnesseth: That the said party of the first part agrees and contracts with the said party of the second part as follows:

First. That the party of the first part is to abandon work on the old well and commence work on a new well to be located on corner of Fifth and Ash streets, as party of the second part may designate.

Second. Party of the first part is to have the privilege to pull all pipes and casings out of the old well, and use same in the construction of the new well.

Third. Party of the first part is to drill said new well to the same flow as the old was finished, or 523 feet deep, which is to the same depth that old well was finished at, and to pipe same with 3 inch std. blk. pipe.

Fifth. That party of the first part agrees to use all due care and diligence to secure clean water.

Sixth. In consideration of the drilling of this well, party of the second part agrees to pay the party of the first part the sum of \$150,

and to release party of the first part from all obligation and liabilities in the old contract of date of November 8, 1905, and which is hereto attached and marked Ex., and made a part of this contract."

The answer then alleges that under said second contract, defendant company sunk and drilled a well to a depth not exceeding 225 feet, and failed to properly construct the well, and failed to obtain water sufficiently clear or in any way suitable for domestic or stock purposes, or to furnish any water whatever, and that defendant well company refuses to dig and procure for the village an artesian well as contemplated in their contract, which are the two contracts above set forth; that the well dug has always been of no value; that a well as contracted for would have been worth to the village \$784.50, the contract price to be paid therefor; accordingly defendant village and its officers demanded the dismissal of the action. This answer was served upon the plaintiffs, and service thereof accepted and admitted by them, as well as by the defendant Artesian Well Company, who by its attorney answered alleging the contracts and performance under them; the digging of the well; that the same was as contracted for; that the well was accepted by the village, and paid for by the payment to the well company of cash in the sum of \$784.50. That said cash was obtained of the plaintiffs under previous arrangement of the village with the plaintiffs, in which the warrants should be drawn and issued to defendant well company, and by them transferred as an accommodation indorser only to the plaintiffs; that no consideration was paid for such indorsement, and that the delivery and indorsement merely constituted an accommodation transaction, whereby the village delivered its warrants into the hands of the plaintiff, and from plaintiff procured the cash to pay the well company for the well dug by it for the village. The well company, further answering, denied that they guaranteed that the warrants sued on were genuine, valid, and enforceable obligations of the village, and denied that there was any legal defense, set-off, or counterclaim to the warrants on the part of the village. Further answering, the defendant, in answer to the contention of the village of Wyndmere, defendant, denied the answer of the village, except admitting its contracts hereinbefore set out with said village, and alleging its full performance thereunder. It further alleges that what it did under the second contract was an independent transaction, and in no wise revoked, set aside, or opened the settlement made for the con-

struction of the well under the first contract, but that, as an accommodation to the village, the defendant well company deepened the first well about 100 feet, and, being unable to make it satisfactory, dug a new well under a second agreement, and that the well so last constructed was dug in accordance with the contract, and completed February 13, 1907; and that, because thereof, the village of Wyndmere became indebted on the second contract to the defendant well company in the sum of \$150; that demand has been made therefor, and payment refused. And judgment was demanded that plaintiff have and recover nothing of it, and that said company recover from the plaintiff for its costs and disbursements; and that it recover of the village of Wyndmere the sum of \$150 and interest.

To the answer of the village, the plaintiff replied denying generally the answer, except admitting the execution and delivery of the contracts, and alleging the compliance therewith by the well company defendant, and the acceptance of the well by the village of Wyndmere. Also, they admit, by way of reply, the execution of the second contract, and allege that the well company defendant has fully performed thereunder, and that the village of Wyndmere and officers ought to be estopped to say that the village of Wyndmere has suffered any damage in relation thereto; and further allege the insolvency of the defendant well company, and pray for damages as demanded in their supplemental complaint. To the answer of the defendant well company interposed to the supplemental complaint, the defendants, village of Wyndmere and officers, served and filed a general denial to all matters contained in the answer and counterclaim, except those matters admitted or alleged in the answer of said village and its officers hereinbefore set forth.

The foregoing recites in substance the pleadings in the three-cornered action in which issue was joined prior to the case being called for trial on the regular December, 1910, term of district court for Richland county. When so reached and called for trial, counsel, on behalf of defendant village, treasurer, and trustees, announced the case as triable to a jury. Counsel for the plaintiffs and counsel for defendant well company joined in a demand that the action be tried by the court without a jury, providing that the court, if it so desired, might submit any fact or facts involved to a jury at the convenience of the court, and, accordingly, moved that the action be tried by the

court as an equity case; which motion was by the court denied, to which ruling both counsel for plaintiffs and company excepted.

A jury was called and trial had on the merits, plaintiffs offering their testimony, and establishing a prima facie case, and resting. The defendants village and its officers offered testimony at length, including the two contracts heretofore set forth. That, under the provisions of the first contract between the well company and the village, the well company, prior to December 16, 1905, dug an artesian well in said village, and secured a flow of water a short time prior to December 16, 1905, but that the water remained roily and full of impurities, and never ran clear, pure water or water suitable for domestic or stock purposes. The village, relying upon the representations of the officers of the well company, and particularly on the second and eighth paragraphs of the first contract, and because of the conditions of said contract reciting that payment for the well was to be made in advance of the expiration of the period for which the same was warranted, paid for the well by the execution and delivery by the village board of the two warrants sued on, which were, on December 16, 1905, executed by the village officers payable to the defendant well company as payees, and were by said company indorsed and negotiated immediately upon their receipt over to the plaintiffs, Hart and Springer, who gave the well company cash to the amount of the warrants.

Such testimony shows that the well was never satisfactory, and never furnished suitable water; that on the March following, the managing officer of the defendant well company put a lock and key on the well to regulate the flow of water to clear the water, without results; that thereafter the flow became clogged; about six months after the warrants had been issued in payment for it, the well stopped flowing altogether. The village repeatedly demanded of the well company that the contract under which the same was dug be complied with, by the repairing of the old well or by the digging of a new one, and finally about the first of February, 1907, seven months after the commencement of this action, and while the payment of the warrants was tied up by the injunctional order originally issued therein, the defendant well company attempted to repair the well, digging it deeper, but soon abandoned work thereon. They and the village then executed Exhibit "C," and thereunder left the first well and dug the second one, to a depth of 315 feet, under the testimony offered by the village, striking

a flow of water on February 15, 1907. The water remained roily, carrying quantities of sand, until the night of February 18th, when it ceased running because of the sand clogging it completely, of which stoppage defendant well company was notified by letter by the chairman of the board of trustees on February 21st following; that the second well was, on February 15th, cased with the casing pulled out of the first well; that thereafter the vice president of the company, who, on behalf of the company, executed both contracts, met with the board of trustees, where he demanded \$150 under the second contract, offering to clean out the well with a force pump he had with him for that purpose, if the board would pay him said sum in advance, which proposition was refused by the board, and thereupon defendant well company abandoned all attempts to further perform under either or both the contracts.

At the close of the foregoing testimony of defendant, the defendant village having rested, the defendant well company moved for an instructed verdict in their favor, and against the village, for the sum of \$150 and interest from the 15th of February, 1907, and also moved that a verdict be returned in their favor, and against plaintiffs, on the ground that they had performed fully under their contracts, and that no failure of consideration for the warrants in the hands of the plaintiffs had been established, and that they were not liable as indorsers or guarantors of the warrants, which motion was denied.

Thereupon defendant well company offered its proof, admitting digging of the well under the first contract executed by it and village, and offering evidence to show that they had refused to dig the well, except that they would be paid in cash; and that the execution and delivery of the warrants to their vice president, and the indorsement by him to the plaintiffs, were but part of an understanding had between them and the village officers and the plaintiffs, whereby defendant company would receive cash instead of warrants, under the cash provision in the first contract. That the flow of the well was about 23 gallons per minute; the water cleared after two days, and the water, ten days from the completion of the well, was, to quote its witness, "what is considered and generally accepted as water sufficiently clear for domestic and stock purposes; that the water was at the time he left it after the completion of the well, and at the time he returned thereto about ten days later, suitable for domestic and stock purposes." That on December



16, 1905, the day the contract was settled for by the village, the volume of water was the same, and the water was suitable for domestic and stock purposes. That about twenty-four days after the well was completed, the well was flowing roily, and it was by the company suggested that the flow be reduced by putting a valve on the well; this was done, and the key turned over to the town marshal, and the flow of the well closed to about 8 gallons per minute. The next December the company's vice president met with the board, when it demanded the company should drill the well deeper. He told them that he considered the old contract fulfilled, and that they were under no obligations to come back under it, but that, if they would pay \$1.50 per foot, the company would drill the well deeper; which proposition was acceptable to the board, "and it was in pursuance of that conversation and proposition, and their acceptance of it and what followed therefrom, that the second contract was made and entered into. Under this contract the pipe was taken from the old well, and moved to where the new well was located, and a well drilled to a depth of 522 feet, and piped with the pipe from the old well, and a flow of about 12 gallons per minute, was struck. Prior to entering upon the construction of this new well, and under this verbal agreement with the board of trustees of the village for sinking the old well to a second or clearer flow, the company drilled the old well from a depth of 522 feet to 615 feet."

Defendant's witness further testified the flow of the second well was about 12 gallons per minute and clear; that he saw it for three days thereafter, and it was then flowing clear water; that during the first of March, 1907, he presented a bill to the village for the \$150 due the company under the contract, stating that he considered the contract complete, and that if they would accept it as such, he would do what he could to restore the flow to the well, which had previous to that time clogged; that in his opinion the sand coming with the water in the pipes had caused the stoppage of the flow of water. That in the opinion of the witness the well did not start flowing roily and sandy on account of any imperfection in the drilling or finishing of it.

The defendant company renewed its motion made at the close of the case of the defendant village, which motion was denied. Thereupon demand was made by the plaintiffs that the court require the jury to find a special verdict, which demand was granted. Thereupon a special verdict consisting of forty-six questions was prepared. The

court prior to the submission of the verdict to the jury, on motion of the respective counsel, answered the greater portion of said questions, and the remaining questions were answered by the jury; but the entire verdict, including the questions answered by the court, and the questions unanswered, was taken by the jury upon their retirement. The record shows the following stipulations entered into just prior to the submission of the matter embraced in the special verdict to the jury, to wit: "It is stipulated in open court by and between the parties to this action, that the questions submitted by the court to the jury in the form of a special verdict covered and included all the issues of fact involved in this action." That the verdict returned by the jury consisted of answers to the questions submitted to them, which verdict was unsigned, but was by the court received as such verdict. No objection was made to the verdict being unsigned until long after the jury were discharged, and motion was made for judgment on the verdict. Thereafter, on the verdict, judgment was entered in favor of plaintiff against the defendant company, for the amount of the warrants with 7 per cent interest to date of judgment, and judgment was also entered in favor of defendants village and its officers, that they recover their costs against said plaintiffs, Hart and Springer; and also that the counterclaim of the well company against the village and its officers be dismissed. Thereafter, and within time, an appeal was duly perfected to this court from the judgment in favor of the plaintiff against said well company, by the service of appeal papers upon the plaintiffs and the defendants village of Wyndmere, its treasurer, and trustees.

The appellant now urges for the review of this court as error the rulings of the trial court, and particularly the action of the court, (1) in trying the case before a jury, over appellant's objection; that the same was a court case properly triable to the court alone, and not a jury case, and (2) that the court was without jurisdiction, contending that jurisdiction cannot be conferred by consent of parties, and could only be acquired under process or by order of court made in pursuance of the provisions of statute as to the bringing in of parties as litigants in the case; and (3) errors of law arising during the trial upon the admission of testimony; and (4) refusal of the court to grant the motions of appellant for a directed verdict; and (5) alleged insufficiency of the unsigned special verdict to support a judgment.

This action was, as begun, purely an equitable action,—no money judgment was asked and nothing sought but an accumulation of village funds. So, the order against the village treasurer, sole defendant, accomplished all that could be done by the action. After the fund was so accumulated, the village and well company voluntarily interpleaded in the action, by agreement with plaintiff and defendant to avoid the evident necessity of beginning two separate actions at law, to determine the rights of all concerned. The case as begun was then changed radically by the appearance of other and additional parties to the action, interpleading without formal order of court so directing. The parties stipulated their issues, accepted service of their pleadings for the express purpose, as appears therefrom, of determining in this one action all the issues involved. These matters for determination were the liability of the village on the original contracts upon which any obligations to pay the warrants in suit must arise, and upon which contracts any counterclaim against the payment of such warrants must be based. Then again, if the village warrants were subject to offset by damages suffered by the village, what was the liability of the defendant company because of its indorsing and negotiating said warrants to the plaintiffs? The determination of these two main questions decides the case. If the village is under no obligation to pay the warrants, because of its release from liability through a valid counterclaim arising out of the transaction under which they were issued, then such negotiation and indorsement of the warrants cannot exempt them from the effect of such counterclaim, they being non-negotiable within the meaning of the law merchant in such respect, and any defense against their payment can be asserted, no matter in whose hands said warrants happened to be.

The issues as between the village and the well company, so far as this action is concerned, are the same as though the well company had sued the village for payment for the construction by it of the well for the village. In fact, under the counterclaim of the company for \$150, such is the issue tendered. Such a suit is one at law and a matter properly triable to a jury; in no sense can it be considered an equitable action. Then again, this action, as between the plaintiffs who hold the village warrants, and the well company, who negotiated the same to them in the first instance, amounts to no issue at all, if the well company recovers judgment in its favor against the village on its

counterclaim, as such a recovery would be tantamount to a finding that the village had no valid counterclaim against the payment of the warrants, and that the village was liable for the warrants outstanding as well as for the \$150 counterclaim. Conversely, should the village recover by a finding of fact to the effect that the warrants were paid by its counterclaim for damages, such would in effect be the equivalent of finding said warrants were without consideration and void. Then the suit as between the plaintiffs and the defendant well company would be the same as between the ordinary purchaser and seller of non-negotiable instruments, which after negotiation proved to be worthless. The determination of these issues between the parties would be strictly a law action involving no equitable principles or equitable relief; it would be the equivalent of a joinder of two suits at law for damages. In other words, had the village and the well company litigated the validity of the warrants in an action brought by the village against the well company for damages, in which the village recovered, and in which action the invalidity of the warrants as between those parties was established, this action, as between the plaintiffs and the well company, involves issues the same as though thereafter the plaintiffs had sued the well company as the seller to them of non-negotiable, invalid warrants. Such an action would certainly have been one triable to a jury on all questions of fact involved. Then again, this action stands as between the plaintiff and the defendant village with no issue involved other than what would be fully determined by the adjudication of the rights of the parties in the above matters; the questions involved being merely the validity of the contracts between the village and the well company, and manner of performance under them, and the liability of the well company to the plaintiffs for the warrants sold and indorsed to them. The pleadings, by attempting to plead an estoppel in one instance, do not change the issues involved or their determination. No sufficient facts are pleaded upon which an estoppel can be predicated, and the pleadings are to that extent merely surplusage. Nor is the action one in which, from the nature of things, an estoppel can arise. If there be a defense available to any of the parties litigant, it is a defense given by law because of counterclaim virtually amounting to a failure of consideration, because of failure of performance under the contract, or a right accruing because of a sale of worthless securities, or a defense in law to such a claim. Indeed, in these par-

ticulars the evidence shows that all the parties had equal knowledge of all matters of fact involved, and all of them dealt with their eyes open, and charged with knowledge of the law. There is an entire absence of fraud or any evidence from which it could be implied. Consequently, the case resolves into an adjustment of the rights of the parties under legal as distinguished from equitable principles. There is nothing upon which an estoppel can be predicated in favor of any of the parties or against any of them, nor is there any groundwork for an estoppel.

For the foregoing reasons, the case and all the issues involved in its determination were properly triable to a jury. Of course, the issues were somewhat involved, as must necessarily be in every action in which three parties attempt to try two different lawsuits in one action. But the parties chose to do so, and because they so elected and so act does not in itself change the nature of the action from one in law to one in equity.

No relief was available to any of the parties except for money judgment, nor was any issue involved except that of an issue of fact for the recovery of money only, and under § 7009 of the Code, such issues must be tried to a jury unless a jury is waived. The court, therefore, was obliged, on the demand of one of the parties, to submit the issues to a jury for their determination.

This brings us to a discussion of the question of jurisdiction raised by the defendant company's claim that the trial court was without jurisdiction over it as a defendant, or of the subject-matter litigated by it in the action. Want of jurisdiction over the person or subject-matter can be urged at any stage of the proceedings; but it is significant that want of jurisdiction was not raised until after the entire trial of the action on the merits, and a determination therein adverse to the appellant had been rendered. Had appellant recovered in the trial court, it would now be strenuously contending for the jurisdiction of that court and the validity of the judgment, were it before this court on its (codefendant's) appeal. This action was begun in the district court by the plaintiffs against the treasurer of the village of Wyndmere. A summons and complaint were regularly issued and served with an order of court based thereon. The court then had by regular process jurisdiction of the parties and subject-matter. Thereafter, by stipulation of the parties recited in the pleadings themselves, addi-

tional defendants were named, among them this appellant company, and the supplemental complaint was drawn to state a cause of action against such company so named as an additional defendant, service of which complaint was accepted and admitted by the attorney for the defendant now urging before this court a want of jurisdiction. Such defendant, in an answer in which it was named as a defendant, answered as such not only the complaint of the plaintiffs, but the pleading of their codefendant village and its officers, thereby bringing such corporation and its matters subject to litigation involved in the transactions in controversy, into the suit voluntarily, and submitting the same along with jurisdiction over it to the court for determination by trial, in order, as the record shows, that all matters in issue might be determined in the one action. To the answer of the defendant company replies were interposed, served, and service accepted. The entire cause was brought upon the trial calendar of said court either by notice of trial served or by stipulation of the parties, as the cause was placed on the court calendar, and that the same was regularly thereon is presumed in the absence of objection. Then the case was moved for trial by the plaintiffs, with appellant joining in said motion and demanding trial by the court. Defendant participated throughout the trial, offering evidence, cross-examining witnesses, putting in its case, moving for a judgment, requesting instructions, joining in preparing a special verdict, even stipulating in open court that the special verdict covered and included all issues of fact involved in this action. After so fully and freely litigating its rights on the merits, and having its day in court, it, for the first time, challenges the jurisdiction of the trial court. Appellant's contention in this respect is unsound, and cannot be upheld. To hold otherwise would be to make a farce of court procedure. Defendant elected to litigate his case with the parties in the manner and form as above, and he is bound by the results, and cannot now be heard to complain because of an adverse decision. If cases are needed to support the holding of this court on the above proposition, see *Boyd v. Wallace*, 10 N. D. 78, 84 N. W. 760, to the effect that "one who is not a party defendant on the record in an action, but who participates in the defense, and has an interest in the matter in controversy in the action, and participates in the defense for the protection of such interest, and not as representing the interest of the defendant of record, and where it is known to the plaintiff that such

party so participates for the protection of his own interest, is bound by the decree rendered in the action." At the conclusion of the opinion, after reciting the above circumstances, the court uses the following language: "That he is bound by the decree under such circumstances has been too often decided to require further discussion." This is the opinion of our own court in a case where the party was bound, although not named in the pleadings as a party to the action. Certainly a party who is named as a party litigant, pleads, defends and submits his cause for arbitrament, would be concluded by the judgment so procured, because of his voluntary acts in invoking jurisdiction and procuring the rendition of the judgment. See also *Anglo-American Packing & Provision Co. v. Turner Casing Co.* 34 Kan. 340, 8 Pac. 403; *Blades v. Des Moines City R. Co.* 146 Iowa, 580, 123 N. W. 1057; *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221, s. c. in 17 S. D. 311, 96 N. W. 132; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037; 3 Cyc. Law & Proc. pp. 515, 516, and notes.

Another contention of the defendant company urged is that the warrants upon which judgment was rendered against said company on its implied warranty to plaintiffs, that the warrants were valid and legal obligations of the village, and not subject to set-off or counterclaim, were merely transferred by it to the plaintiffs as a mere conduit of title in which it was in the position of an accommodation indorser only, transferring the warrants to the plaintiff under a prearrangement with the village officers and the plaintiffs themselves, trustees of the village, and that all this was done in order that the village might comply with its contract, wherein it agreed that the consideration for the drilling and casing of the well to be paid by the village was "to be paid *in cash* at the completion of the well."

As to this contention, defendant company, at the time of the execution of the contract calling for payment to be made in cash at the completion of the well, being bound to know the law, thereby knew that the contract called for the performance of a legal impossibility on the part of the village. If the contract was to be construed literally to the effect that cash, instead of village warrants or orders for payment of money, was to be the payment for said well at its completion, the defendant company is presumed to have known that the provisions so imputed would call for an *ultra vires* act on the part of the corporation. Defendant company, like all persons dealing with a municipal

corporation, is bound to know the extent of its powers, and cannot hold it liable for a false representation by its officers concerning matters not within its powers, or for the breach of contract that they have no authority to make on its behalf. *Sandeen v. Ramsey County*, 109 Minn. 505, 124 N. W. 243, and cases cited. Therefore, under defendant company's contention giving its chosen construction to the transaction, the village could in no wise be bound, nor could its officers as officers of the village. No legal payment could be made to defendant for the well, by the village or its officers as such, without the issuance and delivery of the warrants or orders of the village on its treasury for the money. And the execution and delivery of such warrants by its officers in its behalf to the defendant company was in law the payment in the only manner allowed by law of any obligations of the village to the defendant company. The warrants so delivered were cash or legal tender payment in contemplation of law; though said warrants were actually worth but a part of their face in law, they were payment at face value. The village, in delivering its warrant to the defendant, could not pay its obligations as it did without conferring the absolute title and ownership in defendant company to the warrant so given in payment. The defendant company then in no way could secure the benefit of the warrants without becoming the actual owner of them, and as such actual owner it had to part with title to the warrant in any transfer of the same to the plaintiff or any other person. It could do so in no way except by a sale and delivery thereof, which it accomplished by indorsing the same to the plaintiffs, receiving from the plaintiffs therefor in cash the face value of the warrants. The law can recognize no other way, nor is there any other manner, in which title to the warrants could have been transferred regularly from the village that issued them to the third party plaintiffs, except in this manner. Nor could the defendant company in negotiating said warrants in any way, except by express contract to that effect, escape the warranty implied by law from such transaction, wherein the rule of law resulting from the act of the defendant company in such transfer made such company a guarantor to plaintiffs that the securities so transferred were not spurious, false, or counterfeit, but, on the contrary, were genuine, unpaid, and not subject to offset or counterclaim. See *Giblin v. North Wisconsin Lumber Co.*, 131 Wis. 261, 120 Am. St. Rep. 1040, 111 N. W. 499; *Scott v. Hix*,



62 Am. Dec. 458, and note (2 Sneed, 192); French v. Turner, 15 Ind. 59; Delaware Bank v. Jarvis, 20 N. Y. 226; Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78, and many cases cited in these leading authorities. The defendant company therefore, on the contention urged, could not escape liability to the plaintiffs resulting from the sale by it of the village warrants, when the village had a valid counterclaim to the amount of the warrants against their payment at the time of their negotiation, as was found by the jury and disclosed by the incontrovertible evidence on the trial of the case.

The village offered proof establishing that the first well dug had failed, and that, under the second and eighth paragraphs of the contract under which said well was drilled, the defendant company was liable on the village's demand for breach of the written warranty that the well would not choke or clog for a period of one year from the date of completion, and that, if the well should stop flowing before that time, the well company would repair the same or drill a new well free of expense to the party of the second part, and furthermore that the well was not according to contract, in that the water was never sufficiently clear for domestic or stock purposes. The defendant company in its main case, by the testimony of its vice president, its managing officer, and the officer who, on behalf of said company, had negotiated all the contracts and performed all the transactions had with the village, established by his testimony that, on the village's demand that the well be repaired or a new well dug, his company, acting by himself, drilled the first well deeper in an attempt to repair the same. That he met with the board, and in further compliance with the first contract, under which the obligation arose to repair the well or dig a new one free of expense, entered into the second written contract with the village. This contract was executed by the village board in session for the purpose, and by the defendant company by its vice president, and under the second contract the second well was begun, and the second contract attempted to be complied with. Then the defendant well company sought to establish that the first written contract had been abrogated by a verbal intervening contract consisting of statements made by him to some members of the board at or during the time the well company, acting by the vice president, was deepening the first well in an attempt to repair the same, the claim being made by the defendant company that this statement by him to some

members of the village board, acted upon by the well company in doing the attempted repair, vitiated the old contract by the establishing of a new one. And defendant company further contends in this connection, that this verbal contract was in turn abrogated by the second written contract. In other words, the defendant well company attempts to escape its liability on the first contract, wherein it agreed to repair the old well or drill a new one free of expense to the village, by asserting some understanding between it and some member or members of the board of trustees of the village, whereby the obligations to perform under the written contract were turned into a consideration for a new verbal agreement with the village exonerating the company from further compliance with its written contract, and creating a liability of the village to the company, and that, because of this verbal, indefinite contract, the second written contract resulted; so that said second written contract was in no wise connected with or dependent upon, or to be construed with or as a part of, the first written contract; to the end that an attempt at performance, as was done by the well company under the second written contract, could be construed by it as a performance thereunder, exonerating it from the written guaranty made by it in the first contract, under which it was obliged to dig a new well or risk the liability of having a counterclaim interposed against the payment of the warrants, thereby totally defeating them, and leaving a resulting liability from the well company to the holders of the warrants. It was in defendant's ingenious attempt to thus avoid liability on its original contract that it sought to offer evidence as to what was discovered on deepening of the first well, and what conversation was had with the village officers in reference to the same, and which offer of testimony was, on objection suitably made, properly excluded. This is the only error alleged as occurring in the admission of testimony in the whole case, and this fact alone is enough from which to infer that the issues were not so involved, but that full proof was allowed and offered concerning all claims of the defendant well company in litigation, and that in fact all parties had their day in court whether the action be regarded as one in equity or a suit at law.

A construction of the contracts shews the testimony offered was without the case and wholly immaterial; the obligation to dig the second well arose under the contract under which the first well was dug.

The reason for the execution of the second contract was the condition in the first one. The second contract expressly provided for abandonment of work on the first well, and that the pipes and casings therein should be used on the second; and the company agreed to use due care and diligence to secure clear water, and was to drill to the agreed depth of the old well, or 523 feet, and receive therefor \$150. The object of the second contract was to leave the situation so beautifully indefinite that the defendant well company, in case it got no water, or bored but a worthless hole in the ground, could construe the same as a compliance with the first contract, wherein it had agreed to dig a well, and for which it had already more than a year before received full payment, and rendered nothing in return. In addition, the well company was to get \$150 of the village for doing what it was already obligated by written contract to do, and also be released "from all obligations and liabilities in the old contract," under which the first well was dug. The written contracts themselves, and the attempted performance under them, render immaterial any oral negotiations pending between the two parties prior to the execution of the second written contract. If the second contract meant anything, it was that it should supplement the first contract, and supersede any oral bickerings between the parties. Had a satisfactory well been dug under the second contract, appellant would have insisted rightfully on his recovery of \$150, regardless of any oral negotiations leading up to it merged therein. The contract operates to the same effect against the defendant company's contention, and excludes every possibility of the testimony offered being properly admissible. Besides, work on the old well was abandoned, and a new well dug under the new agreement. Why the old well was abandoned is immaterial. The parties abandoned it by written agreement, and thereby rendered the reasons therefore wholly immaterial.

This takes us to the questions raised by appellant regarding the special verdict. Under the stipulation between the parties, the questions submitted to the jury under the special verdict covered and included all the issues of fact in the action, and the sufficiency of the verdict as a special verdict was by stipulation waived. The intent of the parties could have been none other than just what is covered in this stipulation. It is noticeable also that, at the time this stipulation was entered into, the court had answered on motion of some of the parties litigant, and over the exception of others, appellant participating there-

in, twenty-seven out of forty-six of the questions, and was about to submit the remaining questions to the jury. The effect of the stipulation was that the court was authorized to supplement such findings by considering therewith any undisputed facts pleaded or admitted as might be necessary, upon which to base judgment.

Nor was it necessary under the evidence at the close of the trial that the court submit many of said questions to the jury for their determination. A careful inspection of the record convinces us that there was no material controverted issue of fact at the close of the case, and that the court could have itself properly answered every question necessary upon which to base the identical judgment entered, or could have directed the jury to have so answered all questions necessarily involved in the determination of the case. In proof of this, we will briefly review the questions submitted by the court to the jury and answered by them.

The first question they were allowed to answer was in substance whether the village executed the warrants sued upon on the date they bore, December 16, 1905. The jury answered this in the affirmative. Defendant company's answer in the fourth paragraph thereof admits the issuance of the warrants, their registration and indorsement, and the receipt therefor of their full face value. No issue was tendered on the pleadings on this question. Question number eight was next submitted to the jury, and answered in the affirmative; the question being whether the defendant company delivered said warrants to the plaintiffs, Hart and Springer, on December 16, 1905. This is admitted by defendant company's pleadings. No issue is tendered on this question. The next question submitted was number sixteen, an inquiry whether the well company, at the time the warrants were executed and delivered, had drilled a well for the defendant village to a depth necessary to obtain a flow of water sufficiently clear for domestic and stock purposes, which was answered by the jury in the negative, the answer to which is purely speculative. No such well was dug, if no water sufficiently clear for stock and domestic purposes was obtained, and as to whether it could be obtained at that place is therefore purely speculative so far as the depth necessary to obtain such a flow of water is concerned. The answer to the question is rendered immaterial by question seventeen, an inquiry as to whether the well drilled under the first contract discharged water sufficiently clear for

domestic and stock purposes at any time; which was answered by the jury in the negative. This answer involved a substantial conflict in the testimony; the village offered testimony of witnesses who had observed the well from the time it began until it ceased flowing, and their testimony describes the flow in particular as to the sand and impurities flowing from the well; and all agree that the water was at all times in fact not proper water for domestic or stock use because thereof. That the uncontradicted testimony shows that, at the time the warrants in issue were being delivered in payment for the well, said well was not satisfactory, in that the water was not sufficiently clear for domestic or stock use, and that at the time of the delivery of said warrants, when the board met to issue them, the vice president of defendant company was told by witness Springer, one of the aldermen at that time, that the water was not clear, Williamson replying that "you have a contract which binds us for a year;" and witness stating to Williamson, "No, that contract isn't fulfilled yet; that contract runs a year, and I understand if we pay this it will make that contract null and void;" Williamson replying, "No, that contract is good for a year." And under such representations, notwithstanding the well was not running water sufficiently clear for domestic or stock purposes, the warrants were delivered in payment of it. Williamson, in defendant company's case, testified that he obtained water from this well such as was generally accepted as water sufficiently clear generally for domestic and stock purposes, and thus describes the condition of the water at the time referred to, but admits that twenty-five days after the completion of the well, and after such time, the flow of water was roily, and, because of it, he reduced the flow from 23 gallons per minute to 8 gallons per minute, hoping that this would clear the well, which the undisputed testimony shows it did not do, and that the well afterwards plugged up on account of the sand carried by the water from the bottom of the well into the pipe. In the light of the foregoing testimony on the subject, and the conduct of the well company in abandoning this well, admittedly because it could not be made satisfactory under the contract under which it was dug, the court could properly have instructed the answer to questions sixteen and seventeen as found by the jury, after which the answer to question nineteen became immaterial. If this answer was erroneously found by the jury, or if the court had answered it in the

affirmative, it could not have changed the result or altered the company's liability to the village under the eighth paragraph of the contract, especially so when the company acknowledged their liability under the second contract and an attempted 'performance thereunder. The court could, under the uncontroverted evidence, properly have answered question twenty-one, as the jury did, in the negative; said inquiry being as to whether the village of Wyndmere at the time of the issuance of the warrants accepted the well as in all respects complying with the terms and conditions of the contract under which it was constructed. The undisputed testimony shows that it was not so accepted. Question number twenty-two, submitted and answered in the negative, was an inquiry as to whether the well was ever delivered to the possession and control of the defendant village. And question number twenty-four, as to whether the village ever took possession, and assumed and exercised control over the first well, which question was answered by the jury in the negative. Both these questions are, under the evidence, immaterial, and the judgment entered could properly be entered without answers to the questions, or with them answered the opposite way to that answered by the jury. Question number twenty-six was an inquiry as to what the first well dug was worth, to which inquiry the jury answered nothing, and regarding which there is no conflict in the testimony any more than there was as to what the village paid for the digging of the well. Question number thirty of the verdict is an inquiry as to whether the defendant well company, under the second contract, dug a well to the depth of 523 feet, to which the jury answered, "No." There is a conflict in the testimony in this particular. The testimony of the village trustees, who measured, shows 315 feet to be the depth, while Williamson's testimony was to the effect that the well was 522 feet deep, so, under Williamson's testimony, the well was not dug to the depth of the former well, and the jury could not have answered the question under the testimony any other way than in the negative. Question number thirty-one was an inquiry as to whether the defendant company used all due care and diligence to secure a flow of clear water from the second well constructed, which was answered by the jury in the negative. Under Williamson's testimony of refusal to use apparatus had with him shortly after ceasing work on the well, which apparatus he states was for the purpose of removing the sand

from the well to allow it to flow, it having previously clogged, and he testifying that he refused the request of the village to do anything more towards making a well of it until he received the contract consideration of \$150, the court could with reason and within the evidence have answered this question as the jury answered it, in the negative. And what is true as to question number thirty-one is true as to question number forty-six, an inquiry whether the defendant dug the second well in such manner as to secure the village a supply of clear water, to which the jury answered, "No." The judgment in no wise depends on the answer, whether yes or no, and it is therefore immaterial. Question number forty-one is an inquiry whether the defendant company dug the second well to a depth of 522 feet, which was answered by the jury in the negative, the answer to which question involves a conflict in testimony as heretofore stated; the jury finding against the well company. Question number forty-two was an inquiry as to whether the second well ever produced a flow of water sufficiently clear for domestic or stock purposes, which question was answered in the negative, and over which point there was no conflict in the testimony whatever, the well having run sand for three days and then plugged up entirely. Question number forty-five was an inquiry as to whether the second well was completed by the defendant company on the 15th day of February, 1907, which was answered in the negative; the jury evidently finding that the well, as a well, was never completed. The other questions answered by the jury relate to the warrants, and are as follows: Number thirty-six being an inquiry as to whether the warrants sued on in this action were issued and delivered by the village to the defendant well company as and for payment for the construction of the well dug under the first contract, to which the jury answered, "Yes," and to which no other answer could have been made, there being no conflict whatever in the testimony, and the pleadings of all parties admitting the same. The same is likewise true of question number thirty-seven, an inquiry as to whether the defendant well company on December 16, 1905, or at any other time, received or accepted said warrants as and in payment for its construction of said well under the first contract, to which the jury answered, "Yes." Defendant company admits the receipt of the warrants in payment, and its indorsement of them to plaintiffs, and pleads the same, so no issue was joined on this question. Question number thirty-nine was

an inquiry as to whether any consideration inured or moved to the defendant well company in consideration of its indorsement of said warrants, which was answered in the affirmative, and which, under the undisputed testimony on this point, could not have been answered in any other way. The court could have properly directed the jury to answer said question in the affirmative.

The foregoing is an analysis of the testimony bearing on the questions under review, and as illustrating that the court could at the close of the testimony have directed a general verdict in favor of the plaintiff, and against the defendant well company, and for dismissal of the village and its officers, and dismissal of the counterclaim of the well company against the village, and so summarily have disposed of the case. The reason why this was not done probably was that no motion therefor was made by either counsel for the village or the plaintiff, they evidently preferring to have a judgment rendered on verdict rather than on motion.

It is obvious then that the objections leveled at the alleged errors in submitting certain questions to the jury for their determination, and in fact all questions involving the validity of the verdict, cannot be considered as error, as no other verdict could have been rendered under the testimony and pleadings in the action than the one found. Under such condition of the record, the action of the trial court denying the motion of the defendant well company that the court direct the jury to find in its favor was proper. Likewise, for the same reasons, was the ruling on certain motions to strike and answer certain of said questions immaterial. *Hedderick v. Hedderick*, 18 N. D. 488, 123 N. W. 276.

But one further question remains for consideration, and that is, that the verdict was not signed by the jury. Counsel for the appellant urges that because of this omission the verdict is void. The question arises under the statute, Rev. Codes § 7031, providing, in trials of civil actions, "the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict." While the statute is positive and requires by its terms the verdict to be signed by the foreman of the jury, the same statute is generally held to be directory, and not mandatory, and the verdict is valid without being signed.

In *Berry v. Pusey*, 80 Ky. 166, the court's opinion reads: "This



provision of the Code [requiring signing of the verdict] is merely directory, particularly in civil cases, and certainly the objections come too late after the jury has been discharged. The jury . . . heard the special interrogatories read . . . and the verdict was then handed to the clerk and again read by him, and the jury asked if it was their verdict, and an affirmative response was made. The verdict was then entered of record and made the judgment of the court, and is binding on the parties to it."

As our procedure is identical with Kentucky as to practice and statutory requirements in this respect, and as no objection was made that the verdict was unsigned on its return and until long thereafter, the remarks of the court above quoted apply; the two cases being identical as to facts.

The statutes of Missouri, § 6269 of 1889, are the same as ours in this respect, requiring the verdict to be signed, and that court in *Gurley v. O'Dwyer*, 61 Mo. App. 348, holds: "That [while] the universal practice in common-law courts for centuries has required such verdicts to be in writing, and to be signed by the foreman of the jury, . . . [yet] an unsigned verdict is not void." That a motion in arrest of judgment will not lie on that account, and such Code provisions are directory merely, citing *Morrison v. Overton*, 20 Iowa, 465; *Burton v. Bondies*, 2 Tex. 203; *Hardy v. State*, 19 Ohio St. 579; see also to same effect, *Harrison v. Singleton*, 3 Ill. 21; *Gary v. Woodham*, 103 Ala. 421, 15 So. 840; *Maloney v. Harkey*, Ga. Dec. pt. 2, p. 159; *Harris v. Barden*, 24 Ga. 72; *Miller v. Mabon*, 6 Iowa, 456; *Menne v. Neumeister*, 25 Mo. App. 300.

Indiana, however, holds to the contrary. *Trout v. West*, 29 Ind. 51; *Noakes v. Morey*, 30 Ind. 103; *Sage v. Brown*, 34 Ind. 470.

In Louisiana, the Constitution requires that the verdict be recorded on the minutes in English, and under the construction of this constitutional requirement, that state holds the verdict must be signed. *Dubstrand v. Laville*, 8 La. 274.

Had the attention of the court been directed by motion or otherwise to the absence of the foreman's signature to the verdict prior to the discharge of the jury, undoubtedly the defect would immediately have been cured by the court requiring such signature.

A verdict, like all other court proceedings, should be construed in furtherance of justice, and not be defeated by a statute intended only

to prescribe uniform procedure, when such verdict is otherwise regular, responsive, sufficient, and just. The holding of many courts that such a statute is directory, and the verdict valid, furnishes ample precedent, and we sanction such interpretation by so holding.

This disposes of all questions submitted. Accordingly the judgment appealed from is affirmed.

All concur, except MORGAN, Ch. J., not participating.

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AANEN MYREN v. L. H. LARSON.

(130 N. W. 1134.)

Opinion filed April 13, 1911.

Appeal from District Court, McLean county; *Winchester, J.*

Action by Aanen Myren against L. H. Larson. Judgment for defendant, and plaintiff appeals.

Reversed.

*J. T. Hoge*, for appellant.

*J. E. Nelson*, for respondent.

PER CURIAM. This action came to this court from a judgment entered in the district court of McLean county for dismissal, with costs, entered upon the exclusion of testimony on the theory that the complaint did not state a cause of action.

On hearing in this court, counsel for defendant concedes the action of the court to have been error, and an inspection of the complaint convinces us of its sufficiency, and that the action of the court in sustaining defendant's demurrer to evidence offered on the ground stated was improper. Accordingly, the judgment entered is ordered set aside, that trial on the merits under the complaint may be had. It is so ordered.

All concur.

**L. O. LARSON and Robert Walker v. ALBERT HANSON and Julius Frederickson.**

(131 N. W. 229.)

**Claim and Delivery—Action on Undertaking—Pleading—Sufficiency of Complaint.**

1. In an action of claim and delivery, for the purpose of regaining possession of the property, the defendants, with sureties, executed a redelivery undertaking conditioned as provided by § 6922, Rev. Codes 1905, "for the delivery of the said property to the plaintiffs if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action." Plaintiffs recovered merely a money judgment against defendants. In an action against the sureties on such undertaking the only breach of its conditions alleged in the complaint being the nonpayment of such judgment, held, that the complaint fails to state a cause of action.

**Claim and Delivery—Action on Undertaking—Form of Judgment.**

2. The obligation of the sureties for the payment "of such sum as may, for any cause, be recovered against the defendants," is not absolute, but conditional merely. Their obligation will be construed in the light of § 7075, Rev. Codes, which requires that a judgment in plaintiff's favor shall be in the alternative "for the possession or for the recovery of the possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof."

**Claim and Delivery—Action on Undertaking—Form of Judgment—Presumption—Principal and Surety.**

3. In a claim and delivery action, a judgment merely for the value of the property and for damages may be rendered where the testimony discloses that the property has been destroyed or lost and cannot be returned, and where such a judgment has been rendered, and there is no proof to the contrary, it will be presumed as against the defendant, that the property has been destroyed or lost and cannot be returned, but such presumption cannot be indulged as against the sureties on the redelivery undertaking. As against the latter, such exceptional facts warranting a money judgment must be alleged and proved in an action on the undertaking.

Opinion filed April 13, 1911.

'Appeal from the District Court, Stutsman county; *E. T. Burke, J.* Action against the sureties on a redelivery undertaking in claim and delivery. From an order denying defendants' motion for a new trial, they appeal.

Reversed and new trial ordered.

*John Knauf*, for appellants.

To hold sureties on a replevin bond, the judgment must be one contemplated by law, that can be satisfied by a return of the property or damage, if delivery cannot be had. *New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 66 N. W. 974; *Gallarati v. Orser*, 27 N. Y. 324; *Field v. Lombard*, 53 Neb. 397, 73 N. W. 703.

*F. A. Coffey*, for respondents.

Plaintiff in replevin may look to sureties on a redelivery bond in satisfaction of his judgment. *Bingham v. Mears*, 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808; 32 Cyc. Law & Proc. p. 91, ¶ "E."

FISK, J. Action to recover on a redelivery undertaking executed by defendants as sureties, in an action to recover the possession of specific personal property, in which the provisional remedy of claim and delivery was invoked. Such action was instituted and prosecuted by respondents herein against William and W. L. Cavern. Judgment was rendered in such action against William Cavern alone, and is for the recovery of money only, to wit, the sum of \$1,562.45, and in no manner providing for nor adjudging the delivery to plaintiffs of the property thus rebonded. Failing to realize the amount of such money judgment upon execution, this action was instituted to recover from these defendants the amount thereof, with accrued costs. Plaintiffs had judgment in the court below for the sum prayed for. A motion for a new trial was made, and an order entered denying the same, from which order this appeal is prosecuted.

Most of appellants' brief consists of assignments of error, there being fifty-three in number, none of which are assigned in accordance with rule 14 of this court (10 N. D. XLVI, 91 N. W. VIII.). They are a mere duplication of the specifications of error, and no reference is made to the page of the abstract wherein the particular specifications may be found, nor to the page or pages of the abstract in which the matter upon which the error is assigned may be found. Nor has counsel attempted in his brief to treat each assignment or group of assignments separately.

Owing to the manner in which appellants' brief is prepared, we might decline to notice any of the assignments of error; but we have concluded to dispose of appellants' main contention, which we understand is that the judgment entered in the claim and delivery action is not

such a judgment as the law authorizes in such an action. In other words, that the only judgment which could have been legally entered was one in the alternative for the return and delivery of the property to the plaintiffs, in case a delivery could be had, or its value in case a delivery could not be had, and damages for its detention, if any.

The judgment in the claim and delivery action being one for money only, appellants contend that by the terms of the redelivery undertaking there is no liability. In other words, it is urged, as above stated, that the only judgment contemplated, whereby these sureties might become liable on the bond, was a judgment in plaintiffs' favor for the return of the property mentioned in such undertaking, or its value, in case a delivery cannot be had, and they cite several authorities in support of their contention; but respondent contends that they are all cases under statutes and undertakings differing from the statute in this state, and the undertaking in the case at bar. Section 6922, Rev. Codes 1905, prescribing the undertaking required in order to obtain a redelivery of the property to defendant, reads: "The defendant may . . . require the return thereof upon giving to the sheriff a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff for the delivery thereof to the plaintiff, if such delivery is adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant." The conditions of the undertaking signed by defendants are in strict conformity to the above statute, the obligation of the undertaking being as follows: "Now, therefore, we, the subscribers hereto, do hereby undertake and become bound to the plaintiffs in the sum of \$2,000 for the delivery of the said property to the plaintiffs, if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action."

The learned counsel for respondents concede that there would be no liability on the part of these sureties, if the undertaking which they had signed was merely conditioned for the delivery of the property, in case a delivery should be adjudged. They say: "Where the sureties obligate themselves only for the return of the property, it is apparent that, if the return was waived and a money judgment entered in lieu thereof, the sureties would not be liable." The recent case of *Gerlaugh v. Ryan*, 127 Iowa, 226, 103 N. W. 128, cited and relied upon by ap-

pellants' counsel, affords an instance of an unsuccessful attempt to hold the sureties where their undertaking was merely for the delivery of the property to the plaintiff in case he recovers judgment therefor. There the Iowa court very properly held, construing their statute and the conditions of the redelivery undertaking, that plaintiff, by electing to take a money judgment, necessarily waived the delivery of the property, and, as a consequence, released the sureties from their agreement conditioned to deliver the property to plaintiff, if he recovers judgment therefor.

Our statute (§ 7075, Rev. Codes 1905,) prescribes the judgment that may be entered as follows: "In an action to recover the possession of personal property the judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof." The judgment in respondents' favor in the claim and delivery action not being for the possession or for the recovery of the possession of the property, but merely a money judgment, and the testimony in that action not being before us, the question arises whether, as against these sureties, it will be presumed in support of the judgment that the proof at the trial disclosed that a delivery of such property could not be had. The rule that such presumption may be indulged as against the defendant in the claim and delivery action appears to be well settled. *Brown v. Johnson*, 45 Cal. 76; *Claudius v. Aguirre*, 89 Cal. 501, 26 Pac. 1077; *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463; *Erreca v. Meyer*, 142 Cal. 308, 75 Pac. 826; and cases cited; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344. But no authority has been called to our attention wherein such a presumption has been indulged as against the sureties. On the contrary, the supreme court of Minnesota, in a well-reasoned opinion, has expressly held that no such presumption will be indulged in an action against the sureties. *New England Furniture & Carpet Co. v. Bryant*, 64 Minn. 256, 66 N. W. 974. We most cordially and fully indorse the views expressed by that eminent jurist, Judge Mitchell, in the above case. The weight of authority under similar statutes is in accord therewith. *Ashley v. Peterson*, 25 Wis. 621; *Gallarati v. Orser*, 27 N. Y. 324; *Cook v. Freudenthal*, 80 N. Y. 202; *Hall v. Law Guarantee & Trust Soc.* 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643. Respondents' contention that the Minnesota decision is based on a statute

differing from the North Dakota statute is not correct. A comparison of the two statutes discloses no substantial difference. Respondent relies on *Thomson v. Joplin*, 12 S. C. 580, which holds, under a statute the same as ours as to the conditions of a redelivery bond, that "the obligation of the sureties, as it regards the return of the property and the payment of any sum recovered, is stated in cumulative language, so that a separate and distinct breach may be assigned as to each." In other words, it was there held, contrary to the holdings in the above cases, that the obligation of the sureties to pay the value of the property was not conditional, but absolute, and that the conditions of the bond to the effect that they are bound for the delivery of the property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant, are separate and independent obligations, a breach of either constituting a cause of action. To the same effect is a later case from the same state, *Parish v. Smith*, 66 S. C. 424, 45 S. E. 16, but in that case the sureties were permitted to return the property instead of paying the money judgment. The reasoning of the South Carolina court does not appeal to us with favor. As lending support to our views, see, in addition to the above authorities, *Field v. Lumbard*, 53 Neb. 397, 73 N. W. 703; *Johnson v. Mason*, 64 N. J. L. 258, 45 Atl. 618.

The conclusion at which we have arrived necessitates a reversal of the order appealed from. Plaintiffs have neither alleged nor proved a cause of action against appellants, and it was reversible error to overrule their objection to the introduction of any evidence under the complaint, and to instruct the jury, in effect, that they should find for the plaintiffs, unless they found that the redelivery undertaking had been materially altered since its execution. The judgment in the claim and delivery action not being in the alternative form as provided by the Code, the plaintiffs, in order to recover against these sureties, must allege and prove facts showing that they were entitled to judgment in the form in which it was entered. In other words, to allege and prove that, in the claim and delivery action, it was made to appear that a return of the property could not be had.

The order appealed from is reversed, and the cause remanded for further proceedings according to law.

All concur, except MORGAN, Ch. J., not participating.

BURKE, J., being disqualified, took no part in the decision, Hon. CHARLES A. POLLOCK, of the Third Judicial District, sitting in his place by request.

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PATTERSON & STEVENSON COMPANY v. HERMAN NURNBERG.

(131 N. W. 256.)

Opinion filed April 13, 1911.

Appeal from District Court, Stutsman county; *Burke*, Judge.

Action by the Patterson & Stevenson Company against Herman Nurnberg. Judgment for plaintiff, and defendant appeals.

Affirmed.

*John U. Hemmi*, for appellant.

*Seiler & Aylmer*, for respondent.

PER CURIAM. This action comes to this court on defendant's appeal from a judgment rendered against him in the district court of Stutsman county. No specifications of error were settled as a part of the statement of the cause, nor was there any motion for a new trial made in the court below. Nothing is before us for review except the judgment roll, and no error is predicated on anything contained therein.

Following *F. A. Patrick & Co. v. Nurnberg*, ante, 377, 131 N. W. 254, this same defendant, recently decided by this court and authorities therein cited, we summarily affirm the judgment without considering any questions attempted to be raised in the typewritten abstracts and briefs. It is so ordered.

All concur.



THE STATE OF NORTH DAKOTA UPON THE RELATION  
OF ANNIE PEPPLÉ v. JOE BANIK.

(131 N. W. 262.)

**Jury — Absence of Jurors Called — Discretion of Trial Judge.**

1. When jurors are being drawn for examination on *voir dire* in a civil action, and some called are absent, it is no error to excuse the absentees and draw others in their places. The trial judge is vested with wide discretion in such matters.

**Jury — Selection — Rights of Litigants as to Jurors.**

2. The court is not required to delay the trial of a cause until the jurors who have failed to respond at the call of their names are brought into court. A litigant is not prejudiced when the persons present to be sworn as jurors are good and lawful men, and competent under the rules of procedure to be sworn in his case.

**Jurors — Examination — Peremptory Challenge.**

3. It is proper to sustain objections to interrogatories propounded prospective jurors, where the examiner assumes the facts in the case in order to ascertain the jurors' opinion in advance, even for the purpose of laying a foundation for peremptory challenges.

**Bastardy — Jury — Challenges.**

4. In bastardy proceedings, where jurors on *voir dire* state that the complaint upon which the proceedings are founded might influence their minds if introduced in evidence, it is no error to overrule a challenge when the juror swears that he can and will try the case upon the evidence presented and the law as given by the court.

**Bastardy — Evidence — Hypothetical Questions.**

5. In bastardy proceedings, where the question of the premature birth of the children is involved, it is not error to ask the mother to state generally the length of the child at the time of birth, and to use her answers as basis for hypothetical questions propounded to a physician in order to elicit his opinion as to whether the children were in fact prematurely born.

**Bastardy — Remarks of State's Attorney.**

6. Under the facts in this case, *held* not error for the court to fail to admonish the jury with reference to certain statements made by the counsel for the state in his address to the jury.

**Bastardy — Instruction — Appeal and Error.**

7. The defendant, in writing, asked the court to charge the jury as follows: "I charge you that, in the general course of nature and under the evi-  
21 N. D.—27.

dence in this case, the period of gestation is from 249 to 285 days, and unless you find that the defendant had sexual intercourse with the complainant within such period, your verdict must be for the defendant." *Held*, not error to refuse the request, as the testimony showed a wider period of gestation than that stated in the request, and the court in its charge gave instruction on the same matter.

**Trial — Instruction — Duty to Request.**

8. Where a party to the action deems the charge of the court not sufficiently explicit, he should present written requests for instruction. *Landis v. Fyles*, 18 N. D. 587, 120 N. W. 566, followed.

**Bastardy Proceedings — Sufficiency of Evidence.**

9. Evidence examined, and *held* sufficient to justify the verdict.

Opinion filed April 15, 1911.

Appeal from District Court, Wells county; *Burke*, Judge.

Bastardy proceedings by the state, on the relation of Annie Pepple, against Joe Banik. From a judgment adjudging him to be the father of the bastard child, defendant appeals.

*Affirmed.*

*Plinn H. Woodward* and *Edward H. Wright*, for appellant.

A litigant is entitled to select the jury from the entire panel present and competent to act. *People v. Edwards*, 101 Cal. 543, 36 Pac. 7; *People v. Compton*, 132 Cal. 484, 64 Pac. 849.

A witness cannot give his opinion upon an inquiry embracing the whole merits of the case, leaving nothing for the jury. *Betts v. Betts*, 113 Iowa, 111, 84 N. W. 975; *Marshall v. Hanby*, 115 Iowa, 318, 88 N. W. 801; *McGibbons v. McGibbons*, 119 Iowa, 140, 93 N. W. 55; *Briggs v. Minneapolis Street R. Co.* 52 Minn. 36, 53 N. W. 1019; *Wilson v. Reedy*, 33 Minn. 503, 24 N. W. 191; *Read v. Valley Land & Cattle Co.* 66 Neb. 423, 92 N. W. 622; *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 282, 54 Am. Rep. 805, 1 N. E. 324; *Fernandez v. Burleson*, 110 Cal. 164, 52 Am. St. Rep. 75, 42 Pac. 566; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

Improper statements by counsel in the argument to the jury, unrebuked by the court, are ground for new trial. *Sullivan v. Chicago, R. I. & P. R. Co.* 119 Iowa, 464, 93 N. W. 367; *Mattoon Gaslight & Coke Co. v. Dolan*, 111 Ill. App. 333; *Rudolph v. Landwerlen*, 92 Ind. 34; *Jung v. Theo. Hamm Brewing Co.* 95 Minn. 367, 104 N. W. 233;

Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879; Houston, E. & W. T. R. Co. v. McCarty, 40 Tex. Civ. App. 364, 89 S. W. 805; Fred Heim Brewing Co. v. Hamilton, 137 Iowa, 376, 114 N. W. 1039; Bjoraker v. Chicago, M. & St. P. R. Co. 103 Minn. 400, 115 N. W. 202; Kiehlhoefer v. Washington Water Power Co. 49 Wash. 646, 96 Pac. 220.

It is error not to define the issues to the jury, and not to charge generally as to the law of the case. C. Aultman & Co. v. Martin, 37 Neb. 826, 56 N. W. 622; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; People v. Murray, 72 Mich. 10, 40 N. W. 29; Sandwich Mfg. Co. v. Shiley, 15 Neb. 109, 17 N. W. 267; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; York Park Bldg. Asso. v. Barnes, 38 Neb. 834, 58 N. W. 440.

To convict of bastardy, proof must show intercourse at a time so that, in the course of nature, the child could have been begotten by defendant. Sonnenberg v. State, 124 Wis. 124, 102 N. W. 233; Soucek v. Karr, 78 Neb. 488, 111 N. W. 150; Masters v. Marsh, 19 Neb. 458, 27 N. W. 438; Allred v. State, 151 Ala. 125, 44 So. 60; 9 Current Law, 386, and cases cited in note 64; Sang v. Beers, 20 Neb. 365, 30 N. W. 258; Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382.

*John A. Layme and Lee Combs*, for respondent.

It is not error not to delay trial and compel the attendance of absent jurors. People v. Collins, 105 Cal. 504, 39 Pac. 16; Johns v. State, 55 Md. 350; People v. Vermilyea, 7 Cow. 369; Green v. State, — Tex. Crim. Rep. —, 65 S. W. 1075; Stephens v. State, 31 Tex. Crim. Rep. 365, 20 S. W. 826; 24 Cyc. Law & Proc. p. 248, ¶ 6, and cases cited; State v. Rountree, 32 La. Ann. 1144; Boles v. State, 24 Miss. 445.

Jurors cannot be questioned as to how they would act upon certain contingencies, or in case certain evidence developed in the case. Fish v. Glass, 54 Ill. App. 655; Woollen v. Wire, 110 Ind. 251, 11 N. E. 236; Keegan v. Kavanaugh, 62 Mo. 230; Com. v. Van Horn, 188 Pa. 143, 41 Atl. 469; Hughes v. State, 109 Wis. 397, 85 N. W. 333; Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406.

An observer may state the result of his observations on matters upon which is possessed equal knowledge, when they cannot be made more perceptible to the jury. Vermillion Artesian Well, E. L. Min. & Improv. Co. v. Vermillion, 6 S. D. 467, 61 N. W. 802, and cases cited;

Hubbard v. State, 72 Ala. 164; Jackson v. State, 29 Tex. App. 458, 16 S. W. 247; 17 Cyc. Law & Proc. p. 87.

BURR, District Judge. One Annie Pepple makes complaint under oath, charging that she is an unmarried woman, and that the defendant is the father of her unborn child, begotten on or about the 17th day of March, A. D. 1908, in Wells county. On or about the 15th day of November, 1908, the complaining witness was delivered of two bastard children, one of which died within a month of birth, and the other being alive at the time of trial. The defendant entered a general denial of the charge, and the case came on to be heard on the 16th day of February, 1909, at which time a verdict was rendered by a jury impaneled to try the case, declaring in effect that the defendant is the father of the bastard children of the complaining witness. Judgment was entered in conformity with said verdict, and, after his motion for new trial was denied, the defendant appealed to this court from the judgment and from the order denying his motion for a new trial, alleging some forty-four errors occurring during the trial, and including the specification that the verdict is contrary to the evidence, as being against the instructions of the court. No question has been raised as to the title of this case, nor any amendment suggested by either party.

The first class of errors has to do with the impaneling of the jury. It appears from the record that among the persons regularly drawn and served to appear as jurors at the term of court at which this case was tried were one D. and one H. The names of these jurors were in the jury box, and when the first twelve jurors were called for examination, the names of these two jurors were called along with others, but neither responded to his name, nor was present during the examination. At the request of counsel for the plaintiff, and against the demand of the defendant, the court ordered the names of two other jurors drawn in place of the absentees. The defendant duly excepted to this direction and order of the court, which order is assigned as error.

There is no merit in this assignment of error. The appellant argues that he was "entitled to have the names drawn from the box, and to have the jurors whose names were so drawn serve upon the trial, unless they are excused." There is nothing in the record to show that the jurors ever appeared in court. The defendant made no application for an attachment to issue to bring them in, nor does he show that he was

prejudiced in any way by the order of the court. As stated in *Johns v. State*, 55 Md. 350: "The accused has no special right in having any particular individual or individuals presented to be sworn as jurors, rather than others equally competent. All that he has a right to demand is that the persons presented to be sworn as his triers shall be good and lawful men, competent under established rules of law to be sworn in his case." The trial court has a wide discretion in excusing jurors, and his act in this case amounted to excusing these two jurors temporarily. This is the uniform practice in our state, and in the absence of prejudice shown, the defendant cannot complain of injury. As stated in *People v. Collins*, 105 Cal. 505, 39 Pac. 18: "If the court were required to suspend proceedings until an attachment could be served and the juror's presence secured, the impanelment of a jury would almost prove interminable."

See also *State v. Rountree*, 32 La. Ann. 1144.

Appellant cites *People v. Edwards*, 101 Cal. 543, 36 Pac. 7, and *People v. Compton*, 132 Cal. 484, 64 Pac. 849. In these cases all the names of the jurors present were not in the box at the time the jury was drawn, nor were the absentees excused. These cases cited were criminal cases, whereas this proceeding is a civil action. Our Code of Criminal Procedure contemplates that a criminal trial may proceed, even if a juror is absent when his name is drawn. Rev. Codes 1905, § 9943.

During his examination of the jury, the defendant, from time to time, interrogated the jurors drawn with reference to the weight they would attach to the complaint in this action sworn to by the prosecutrix, and, when the court sustained the objections of the plaintiff thereto, duly excepted, and has assigned some seventeen errors based upon this action of the court. The following question is a fair sample of this line of examination: "Suppose the state should present a sworn complaint to you, in which she swore that Joe Banik is the father of her child, and should not offer any other evidence, and the defendant should not offer any evidence of any kind; what would be your verdict, that he was guilty or not?" The objection to this line of examination is well taken, and the court committed no error in sustaining it. The defendant, in his brief, practically admits that the complaint could not have been received in evidence under the rules of practice, but claims that it was necessarily before the jury in their deliberations, being the

initial pleading in the case. "Questions as to what a jury would do or not do under a supposititious state of affairs may properly be ruled out." *Hughes v. State*, 109 Wis. 397, 85 N. W. 333; *Fish v. Glass*, 54 Ill. App. 655; *Keegan v. Kavanaugh*, 62 Mo. 230. In *Niezorawski v. State*, 131 Wis. 166, 111 N. W. 250, it is stated that inquiries as to the effect on the mind of a prospective juror of the finding of an indictment are not within the proper scope of his examination. The inquiries of the defendant related simply to the possible action of the jury upon hypothetical cases, and no party has a right to assume the facts and ascertain the juror's opinion in advance. *Com. v. Van Horn*, 188 Pa. 143, 41 Atl. 469, 472; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

Defendant alleges that he had a right to so interrogate the jury in order to lay a foundation for peremptory challenges. In *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, where the trial court refused to allow the appellant to ask three jurors how they would decide if evidence were equally balanced, and where the appellant claimed he had a right to so interrogate in order to lay a foundation for peremptory challenges, the court says: "In civil cases it is the absolute duty of jurors to take the law from the court, and they are not supposed to know what the rules of practice are that govern in the progress of a cause through the court. . . . In our opinion the denial of permission on the preliminary examination of jurors, to obtain from them, by means of hypothetical questions that call for the decision of a question of law, a prejudgment of the case, and a statement in favor of which party they would decide in a supposed state of the evidence, is not error." See also *Thomp. Trials*, § 102.

Seven of the jurors had been thus interrogated, and the defendant exhausted his peremptory challenges in removing three of them from panel. This examination took place, of course, before the court gave its charge to the jury, and the fact that the court in its charge did not instruct the jury to disregard the complaint as evidence does not make the court's ruling error, in the absence of a request to that effect on the part of the defense. In his brief the defendant says: "The omission of the court to so charge (against considering the complaint as evidence), especially in view of the interrogatories propounded to the jurors, may well have been taken by them as an indication that in the mind of the court the jurors were entitled to consider the complaint

as evidence." It was the defendant himself that propounded the interrogatories, and, in the absence of a request to the contrary, he cannot be heard to complain thereof.

Three of the jurors, on their examination, and before the objections of the respondent to this line of examination were sustained by the court, stated that they might give some weight and attach some importance to the sworn complaint of the prosecuting witness, and at first appeared to be doubtful whether they could disregard it. Each juror, however, swore that he could and would try the case solely upon the evidence. The defendant challenged each juror for cause, which challenges were overruled. This ruling is assigned as error, particularly in view of the fact that these men served on the jury, and all of the defendant's peremptory challenges were exhausted in the selection of the jury. There is no merit in this contention. The ruling of the trial court on the matter of challenges is entitled to great weight. *State v. Werner*, 16 N. D. 83, 112 N. W. 60. The defendant could not be heard in complaint so long as his cause is tried by a jury who can and will try the case solely on the evidence and the law of the case. There is nothing in the examination of the said jurors to indicate prejudice or bias on their part against the defense.

During the trial of the case, it was argued that the children born to the complaining witness of necessity must have been premature. The complaining witness alleged that the children were begotten on or about the 17th day of March, 1908. In order to show that the children were in fact of premature birth, the counsel for the plaintiff asked the prosecuting witness the following questions: "Do you remember how long they were from head to soles of the feet?" "Can you tell generally what the length of them was from the head to the feet?" "Do you know what the length of them was?" "Can you tell generally what the length of them were from the head to the feet?" The defendant objected to these questions as being incompetent, irrelevant, and immaterial, and calling for conclusions of the witness, alleging that the length of the children was subject to exact measurement, and was not a subject for opinion evidence. Upon the answers of the prosecuting witness to these questions, the state based in part the hypothetical questions propounded to a physician. The prosecuting witness claimed that she and the defendant had had sexual intercourse for the first time on the 17th of March, 1908. That she never had intercourse with any

man prior to that time. It is conceded that the children were born November 15, 1908. There was no error in overruling the objections to these questions, nor in permitting the physician to testify as to whether children of the length and weight testified to by the prosecuting witness, conceived at the time alleged and born at the time admitted, were in fact premature. The prosecutrix testified that one of the children lived only twenty-one days; that each child was about a foot long, and weighed from  $5\frac{1}{2}$  to 6 pounds; and the state had a right to assume these as facts, and then to ask the expert as to whether, in his opinion, the children were in fact prematurely born. Other objections to the introduction of testimony were made. It would do no good to set these out in full. We find no errors in the rulings of the trial court with reference to the introduction or exclusion of evidence.

During his argument to the jury, the state's attorney made use of the following expression: "A bastardy action is to find out who the father of the child is. Otherwise the support of the child would fall upon the state." The appellant's counsel promptly excepted to this statement, and asked the court to admonish the jury to disregard it. The defendant excepted to the failure of the court so to do, and this failure is charged as prejudicial error. The state's attorney was not referring to the particular case at bar, but in a general way was stating the object of bastardy proceedings. There is no error in such ruling. It is true the support of a bastard child may not necessarily fall upon the state, even where its paternity has not been established, but there could be no prejudice to the defendant in this statement.

A written charge was given, and, before the said charge was delivered, the defendant filed with the court a written request for the following instruction: "I charge you that, in the general course of nature, and under the evidence in this case, the period of gestation is from 249 to 285 days, and unless you find that the defendant had sexual intercourse with the complainant within such period, your verdict must be for the defendant." This request was refused. There was no error in the refusal. The testimony of some of the physicians who were sworn showed that a child born 210 days after conception might survive, and that cases were on record in which children were not born until 313 days after conception. It is true that the same physician testified that the lowest average period of gestation was 249 days, but the court in its instructions to the jury said: "As the testimony of



the complaint shows the birth of the children within 244 days of the alleged acts of intercourse with the defendant, the burden is upon the plaintiff to establish, by a fair preponderance of the evidence, that the children were of premature birth, and unless you believe from the evidence that the children were in fact of premature birth, then I charge you that your verdict must be in favor of the defendant." In view of this instruction and of the testimony in this case, there was no error in refusing the written request.

The defendant excepted "to the failure of the court to define the issues in this case, and to charge the jury generally as to the law applicable thereto." The only instruction requested is the one quoted in the preceding paragraph. "If appellant desired more explicit instructions than were given by the court, they ought to have been presented to the court in writing, with the request that they be given." *Landis v. Fyles*, 18 N. D. 587, 120 N. W. 566. Not having been requested, the defendant cannot be heard to complain. See also *State v. Haynes*, 7 N. D. 352, 75 N. W. 267.

Lastly, the defendant alleges that the court erred in overruling his motion, made at the close of the state's case, to direct a verdict for the defendant, in overruling the same motion made at the close of all the testimony, and in denying his motion for a new trial on the ground that the evidence was not sufficient to justify the verdict. The evidence is amply sufficient to justify the verdict. The prosecuting witness, who was seventeen or eighteen years of age at the time the children were conceived, testified that while on a visit at the home of a married sister of the defendant, the defendant carried her into a bedroom adjacent to the living room, and there had intercourse with her several times; and that she never had intercourse with any other man. Defendant's sister and her husband both admit the presence of the prosecuting witness at their home on or about the time specified, and the fact that the prosecuting witness and the defendant retired to this bedroom. They differ on minor details, such as the time that elapsed while in the bedroom, but agree that the prosecuting witness and the defendant were in this bedroom alone for some time in the evening, and that there was no light in the room. There is no proof whatever, even suggested, that any other man had intercourse with the prosecuting witness, while the defendant's brother and uncle, who were his own witnesses, testified to the effect that the defendant had admitted he had had intercourse with

the prosecuting witness on or about the time she alleged. The prosecuting witness's father testified that the defendant admitted having intercourse with the prosecutrix, but did not want to marry the girl until he found out what time the children were born, so as to see whether he was their father. The defendant was present at the trial, and did not take the trouble to go on the stand and deny the statements of the prosecutrix. The evidence shows that the children were prematurely born, which, of itself, would tend in some degree to corroborate her statement as to the time of the conception. Under the said evidence the jury could not well have found otherwise than as they did. The jury are the judges of the facts, and their verdict will not be disturbed, in the absence of a want of substantial evidence.

The judgment of the lower court is affirmed.

All concur, except MORGAN, Ch. J., not participating, A. G. BURR, Judge of the 9th Judicial District, sitting by request.

Judge BURKE, having presided at the trial in the lower court, took no part in this hearing.

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STATE OF NORTH DAKOTA EX REL. W. S. SHAW v. LISLE THOMPSON, as City Auditor of the City of Minot, North Dakota.

(131 N. W. 231.)

**Municipal Corporations — City Commissioners — Voters and Elections — Cumulative Voting.**

1. Chapter 45 of the Session Laws of 1907, prescribing the general law under which cities may adopt a plan of city government known as the commission system, does not authorize cumulative voting in the election of city commissioners.

**Supreme Court — Prerogative Writs — Mandamus — Original Jurisdiction.**

2. Under the law the duty is upon the city auditor to prepare, and cause to

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Note.—Exclusiveness of jurisdiction of court of last resort to issue remedial writs for prerogative purposes, see note in 13 L.R.A. (N.S.) 768.

Original jurisdiction of court of last resort in mandamus case, see note in 58 L.R.A. 833.

be furnished, the ballots and election supplies necessary to the conduct of such election.

*Held*, under the facts peculiar to this case, that this court has the jurisdiction to issue an original writ, and the same is accordingly issued.

Opinion filed April 20, 1911.

Mandamus by the State, on the relation of W. S. Shaw, against Lisle Thompson, city auditor of Minot.

Writ granted.

*Palda, Greene, & Aaker*, for petitioner.

*Arthur Le Sueur*, for respondent.

Goss, J. This is an application to this court that it take original jurisdiction and issue its prerogative writ of mandamus on the application of petitioner, a private person, against the officer of a municipal corporation in a pending election matter. The original jurisdiction of this court is not challenged, but its right to issue its prerogative writ depends upon whether there exists sufficient jurisdictional cause for its prerogative use. These prerogative writs named in § 87 of the Constitution, excepting the writ of injunction, come to us as common-law writs modified by court usage, as ordinarily applied, until their high prerogative characteristics under which they were first used are ordinarily ignored and overlooked. But their use by this court is similar to that to which they were originally applied, namely, as high prerogative writs. As so used, they were then and now are issued in the exercise of sovereignty, through the medium of the court of last resort; and as so used are distinguished in nature from writs ordinarily termed by the same name in every day use in inferior courts. This court issues its prerogative writ only when invoked and moved so to do by matters affecting the sovereignty of this state, its franchises, or prerogatives as a state, or the liberties of its people, and then only when the circumstances demanding such writ are so extraordinary and peremptory that to intrust their determination to, or await their adjudication in, inferior courts, would result in failure or inadequacy of relief. See § 87 of our state Constitution and the following authorities: *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234; *State ex rel. McCue v. Blaisdell*, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141; *State ex rel. Mitchell v.*

Larson, 13 N. D. 420, 101 N. W. 315; *State ex rel. Hagendorf v. Blaisdell*, 20 N. D. 622, 127 N. W. 720; *State ex rel. Minehan v. Wing*, 18 N. D. 242, 119 N. W. 944; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705. These cases are illustrative of instances in which this court has taken or refused jurisdiction in application for original writs. Our Constitution is similar to that of Wisconsin and Colorado, and early decisions in those states furnished the precedent followed by this court in determining when original jurisdiction would be exercised in the issuance of prerogative writs. See *Atty. Gen. v. Blossom*, 1 Wis. 317, and two subsequent opinions by Chief Justice Ryan of that state in *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425, and *Atty. Gen. v. Eau Claire*, 37 Wis. 400. These are followed in the able opinion by Justice Corliss in *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234. Other interesting cases on the subject are: *People ex rel. Atty. Gen. v. Tool*, 35 Colo. 225, 6 L.R.A.(N.S.) 822, 117 Am. St. Rep. 198, 86 Pac. 224, 229, 231; *People ex rel. Farmers' Reservoir & Irrig Co. v. Jefferson Dist. Ct.* 46 Colo. 386, 24 L.R.A.(N.S.) 886, 133 Am. St. Rep. 84, 104 Pac. 484; *State ex rel. West v. Cobb*, 24 Okla. 662, 24 L.R.A.(N.S.) 639, 104 Pac. 361; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 628, and see also the editorial note in *People ex rel. Graves v. District Ct.* 13 L.R.A.(N.S.) 768.

The question now arises whether, under the facts as disclosed by relator's application, this court would be warranted in determining that it had jurisdiction to issue the prerogative writ prayed for. This involves the consideration of the facts presented, which we will briefly recite.

The respondent, the city auditor of a municipal corporation, the city of Minot, is about to present to the electors of that city, for their use in the coming city election on April 4th, a ballot upon which is a direction to the voters respecting candidates for city commissioners, contained in the following words printed upon the proposed ballots: "Vote for two or two votes for one." Three candidates, among them relator, seek election as city commissioners. There are but two such offices to be filled. The present board of city commissioners have authorized such ballot to be prepared for the avowed purpose of permitting cumulative voting for such candidate. The application further shows that if cumulative voting is permitted, it will be largely exercised, with the

result that if it is illegal the election will be invalidated, and the right of the electors of the municipality to a valid election and the full and legal choice of municipal officers be denied. Likewise, the private rights of relator as a candidate for said office will be infringed, and there will be cast upon him the unnecessary burden of defending in the courts any rights obtained by him under such election. Ballots permitting cumulative voting have been prepared by respondent, and will be used in the election unless prevented by court order. Application for a remedial writ was made to the district court of the district wherein the municipality in question is situated, and relief was denied. Relator has acted with the utmost of diligence since the contemplated act of the respondent has been known or made manifest. No adequate remedy exists at law or in equity to prevent such illegal act of the auditor respondent as is complained of, except the writ herein applied for, and if relator is denied the same, he is without relief.

The court will take judicial notice of the municipalities of the state operating under the plan of government known as the commission system of government for cities, as defined by chapter 45 of the Session Laws of 1907; that all cities operating thereunder hold their elections for the selection of their municipal officers at the same time; and that at the coming election many cities operating under the commission form of government will choose officers. In doing so they will operate under two conflicting methods, one or the other of which must be illegal, thereby tending toward uncertainty and embarrassment in the municipal government of these communities. That all such cities and the many thousand of electors in them will be similarly affected; that the time between this application and the election is too short to permit a determination, by a proceeding through the usual channels and methods of court procedure, of the question of legality of cumulative voting under such statute. The real question in litigation is not, primarily, the right of the relator to the office incidentally within the determination of the question submitted, but instead the decision of the method of the election, and the right of any elector among the thousands to vote more than one vote for one single candidate. The question before us is the construction of a law clearly affecting not only the local community and its candidates, but also the operation of the law throughout the entire state, in all cities having the commission plan of city government. The law is a new and important one of uniform applica-

tion throughout all cities similarly affected. Besides, the state, by reason of the taxing power of such municipalities, as well as its general welfare in them, is entitled to have a valid election in such local, self-governing bodies, that it may be assured of the regularity of the exercise of taxing powers procuring its revenue. It is further interested in having regularity in the election of such officers, that governmental functions may be properly exercised with uniformity throughout the state; this to the same extent as the state is interested in having all municipalities organized under general law, that the performance of official duties may be uniform as well as general. Also, all citizens and electors of the municipalities so affected have a right to have a law prescribing the method of election of their principal officers declared and settled. The fact that such officers have practically all to do with the rights of property, as well as enforcement of law and order affecting the people themselves directly under the commission system, radically different from that in cities without that plan, is urged as an additional reason why we should assume jurisdiction. It is a fact that under the commission system of government legislative, executive, and administrative powers of government are, for business purposes, such as directness and rapidity of operation, as well as economy, responsibility, and system, centralized in its commissioners, who exercise these governmental functions under a bureau system of city government. In this country, from time immemorial until this system was conceived and put in operation under force of circumstances amounting to catastrophe, no set of men in governmental affairs were intrusted, without a governmental system of checks or balances, with such general powers as under the commission system of government. Such, in brief, is the responsibility of the office sought by relator in his candidacy. And to the above extent has the state an interest in the event of our decision on the questions *publici juris* involved.

Under these circumstances we are impressed with the necessity to assume jurisdiction, and are convinced beyond the peradventure of a doubt that to do so is but the exercise of our sound discretion, which to do otherwise would be to abuse. Nor are we without precedent in so doing. In *State ex rel. Rinder v. Goff*, 129 Wis. 668, 9 L.R.A. (N.S.) 916, 109 N. W. 628, the Wisconsin supreme court holds the decision of a similar question arising on the construction of its primary election law, under less peremptory circumstances, to be a mat-

ter concerning the duty of the election officers of the state, and affecting thereby the sovereignty of the state and the liberties of its people, in aid of which, and to determine the course of official conduct to be pursued, the court assumed jurisdiction to hear and determine by the prerogative writ of mandamus. Likewise, the state of Colorado in *People ex rel. Atty. Gen. v. Tool*, 35 Colo. 225, 6 L.R.A.(N.S.) 822, 117 Am. St. Rep. 198, 86 Pac. 224, 229, 231, assumed jurisdiction to prevent wholesale election frauds in the city of Denver, holding that the state in its sovereign capacity, by the very terms of its being, is intrusted with powers and duties to be exercised and discharged for the general welfare, and for the protection of the rights and liberties of its citizens; and that the interest of the state in a legal election was sufficient to authorize the court by prerogative writ to prevent the wholesale threatened violation of such right. That it is the duty of the state to preserve unimpaired every channel through which powers are exercised necessary for the protection of the rights and liberties of its citizens; and to deny to the court of last resort the power to enforce by prerogative writ the sovereign rights of a state in such respects was to deny the supremacy of state government itself. We have similar precedent in this state. See *State ex rel. Mitchell v. Larson*, 13 N. D. 420, 101 N. W. 315. We will accordingly assume jurisdiction to hear and determine this application under the power conferred by § 87 of our Constitution.

This brings us to the method of election of city commissioners, and the question first to be considered thereunder is whether cumulative voting is permitted in electing officers in cities operating under the commission plan of government. Nowhere else in our scheme of state government is there a possibility for a contention that cumulative voting is allowed. If it is permitted in the case under consideration, § 15 of chapter 45 of the Session Laws of 1907, found on page 41 of said Session Laws, must be the authority therefor. This statute reads as follows: "Commissioners; how elected. The president of the board of city commissioners and four city commissioners shall be elected by the legal and qualified voters in the city in the following manner: The president of the board of city commissioners and the four city commissioners shall be elected at large, and not by wards. Each voter shall be allowed to cast but one vote for the candidate for the office of president of the board of city commissioners. Each voter shall be al-

lowed as many votes for the candidates for the office of city commissioners as there are commissioners to be elected, such votes to be distributed among the candidates as the voter shall see fit, but no voter shall be allowed to cast more votes than candidates to be elected." The following section also has a bearing upon the interpretation of the foregoing, reading: "Terms of office. Each of said four commissioners and president of the board shall hold office for four years from and after the date of his qualification, and until his successor shall have been duly elected and duly qualified, except the first board; the two commissioners receiving the highest number of votes shall hold for four years, the two receiving the next highest for two years." In the chapter are provisions declaring how vacancies may arise, and that same may be filled by an election called for the purpose. Sections 33, 34, 36 and 21. And that officers so elected hold until the next regular election. Section 35.

It is apparent from the particularity used in prescribing the manner of election, qualification, appointment, and length of terms of officers, that the legislature, in enacting this chapter, did so with the idea of putting in force thereby a statute as complete in these respects, as in all other particulars, as it was novel in nature. A careful perusal of the entire chapter convinces us that for breadth of subject as well as for completeness in detail it is something unique and out of the ordinary in legislation. The act creates officers formerly unknown and designates them by new names, and, considering the way with which all matters ordinarily left to general statute are provided, it is but reasonable to conclude that the language of the entire act in all particulars was carefully chosen, that the words as used might express the exact meaning of the statutory intent, under the usual rules of statutory construction. With this in mind, let us analyze the section of the statute heretofore quoted. Section 13 of the act provides: "The officers of cities incorporated under this act shall be a president of the board of city commissioners and four city commissioners, who, together with the president, shall be known as the board of city commissioners." Section 15 is headed, accordingly, in logical sequence and precision: "Commissioners, how elected. The president of the board of city commissioners shall be elected by the legal and qualified voters in the city in the following manner: The president of the board of city commissioners and the four city commissioners shall be elected at large, and not by wards.



Every voter shall be allowed to cast but one vote for the candidate for the office of president of the board of city commissioners. Each voter shall be allowed as many votes for the candidates for the office of city commissioners as there are commissioners to be elected, such votes to be distributed among the candidates as the voter shall see fit, but no voter shall be allowed to cast more votes than candidates to be elected."

Applying the foregoing reasoning, bearing in mind the statutory provisions, there must always be candidates, that is, more than one candidate to be elected (and except in extraordinary and unusual cases, there can never be but two candidates for commissioners elected), it is plain the statute was framed purposely in the plural, thereby preventing cumulative voting, as a voter must follow the statute strictly, and literally vote for at least two; and it is presumed the statute is to be construed in the light of its ordinary usage, which is for the election of two commissioners. But counsel for respondent may quote § 6720 of our statute, that "words used in the singular must include the plural, and the plural the singular, except when a contrary intention plainly appears," and inquire what will happen when, as in the case of a special election, if it be permitted under the statute at all, but one candidate can be elected. The answer is found in the fact that under the terms of the statute but one candidate could then be voted for, as "each voter shall be allowed as many votes for the candidates for the office of city commissioners as there are commissioners to be elected." Of necessity then, under any construction, before cumulative voting can be had, there must be more than one commissioner to be elected, and the idea of cumulative voting cannot apply where but one commissioner is to be elected. Such being the case where more than one candidate can be elected, in view of the fact that two is the ordinary and usual number to be elected, the statute expressly by its terms, taken literally, excludes the intention of the singular, and unless the statutory rule quoted the statute is to be construed in the light of the plural. When so construed,—in other words, when the plain statute as read is taken in its ordinary meaning in plural form,—it negatives cumulative voting by forbidding a voter to vote more than one vote for a candidate, as the voter has as many votes as there are candidates to be elected, and he must distribute his votes among the candidates, and in so doing, in order to comply with the statute, must, if he votes more than one vote, vote for at least two candidates. This negatives the very idea of cu-

mulative voting, as, in order to vote cumulatively, the voter must not distribute his votes among the candidates, but instead concentrate his votes upon one candidate, thereby casting more than one vote for some one candidate. As the statute is framed in the plural, and as candidates must be voted for if more than one vote is exercised by the voter, it is impossible to do cumulative voting under the statute, unless at least three commissioners are running for office, and this is an extraordinary happening, something unusual. A statute is not construed on a basis of what its operation may be in unusual events, but, on the contrary, it is to be construed in the light of the usual method and usual conditions incident to its application. Then again, if there can be no cumulative voting when but one or but two (the latter the usual number) commissioners are to be elected, it would be extremely unreasonable, to say the least, to give a construction whereby cumulative voting would be permitted when three or four commissioners can be elected. A statute, where possible, must be given a construction that will be uniform in its operation, regardless of numbers of offices to fill.

But respondent contends that the provision thereof relative to the election of president is to be construed together with the statute as to election of commissioners, and that the statute providing "each voter shall be allowed to cast but one vote for the candidate for the office of president of the board of city commissioners" is an indication that it was intended that the voter can distribute as many votes as there were commissioners to be elected among the candidates, as the voter should see fit, and that it was intended thereby that the voter could vote cumulatively on commissioners. Such a construction would, for previously stated reasons, not grant cumulative voting. Then again such a construction overlooks the reason why the law provided that "each voter shall be allowed to cast but one vote for the candidate for the office of president." The statute was framed to be definite and certain, "to a certain intent in every particular," when construed as a whole.

Attention is called to the use of the word "distribute" in the clause, "such votes to be distributed among the candidates as the voter shall see fit." If this word "distribute" is to be construed as meaning cumulate or concentrate, or to be applied as used synonymously with either of those terms, the word would certainly not be used in its usual sense, and indeed a new definition from any to be found would be necessary, if we were to say such use was proper. Webster defines "distribute"

as follows: "Distribute: To divide among several or many—to deal out—to allot." Accordingly, "to divide among several or many" would negative cumulative voting, in the sense that it would be inconsistent with concentrating votes upon one. To divide votes among many is to vote for more than one; so is the act of apportioning votes among many, likewise, to allot votes among many. Considering that at least two candidates must be elected in every election contemplated by the statute, except in emergencies not contemplated, it is clear the proper interpretation of the statute containing this term irresistibly compels its construction to mean that, where two candidates are to be elected in an election, when the voter has two votes, as many as candidates standing for election, the voter, if he exercises his full right of franchise, must vote, in dividing his votes among several, for at least two candidates. Again we find the word under its correct definition, although used perhaps peculiarly, exactly expressing the intent of the lawmakers, and fitting in as a part of a statute as literally complete as it is exact.

Again the word "distribute" has been interpreted judicially as meaning "spreading." See *Morgan v. Baltimore*, 58 Md. 509, 519. What is true as to the application of the Websterian definition as above is true as to this definition. Certainly, if the votes are spread, they cannot alight on one lone candidate. The use of the word "distribute" then cannot be held to be synonymous with "concentrate" or "cumulate."

In this connection, bearing in mind that § 13, as heretofore quoted, designates both the president and the commissioners as the board of city commissioners, and § 15 mentioned them as "commissioners; how elected," collectively, and discriminates as to manner of election between the president and commissioners, the statute would be incomplete without the provision referred to, that "each voter shall be allowed to cast but one vote for the candidate for the office of president of the board of city commissioners." In other words, without this provision the same counsel would be contending that, inasmuch as the candidates for office of city commissioners were by the last portion of the paragraph definitely provided for, as to their election, and the question of election of the president of the board not provided for, either the president was to be elected as a city commissioner and receive votes distributed among city commissioners, perhaps cumulatively, or else that no definite procedure at all was prescribed for his election, either of which would be certainly as reasonable a construction of the statute as the one now

urged. In view of the care with which this act as a whole is framed, and considering that when construed as a definite direction to voters as to each officer in a class, president and commissioners respectively, the statute itself classifying them, and expressly defining it as positive, plain, unequivocal, and unambiguous terms as English language can convey, the manner of their election, with the unusual particularity of prescribing the manner of exercise of suffrage concerning the election of each, it would seem that the plain intent as determined from ordinary construction of plain English would be given, instead of a forced construction wholly inapplicable. To hold otherwise would be in violation of the rule of law that the whole statute is to be construed together, and if, when so construed, the statute be definite, clear, explicit, and applicable, such construction must prevail. We certainly cannot, because of the unusual detail in which the statute in its completeness is set forth, and the precision with which words therein are used, imply an intent on the part of the legislature in framing the act to mean other than what is so set forth in the statute. It would be a queer doctrine of statutory construction that a statute taken as a whole could be so complete and definite that it should be interpreted otherwise.

Another matter deserving attention is noticeable regarding this section of the statute. This is the last clause, reading: "But no voter shall be allowed to cast more votes than there are candidates to be elected." This clause is wholly unnecessary so far as defining the number of votes the voter may cast, as that matter is covered by the first clause in the last half of the paragraph, which clause reads: "Each voter shall be allowed as many votes for candidates for the office of city commissioners as there are commissioners to be elected;" which provision amply covers this question. Taken together, these two sections would read as follows: "Each voter shall be allowed as many votes for the candidates for the office of city commissioners as there are commissioners to be elected,—but no voter shall be allowed to cast more votes than candidates to be elected." These two provisions placed in such relation to each other show that the last provision is wholly unnecessary, except that its only purpose is to serve to make this part of the statute mandatory. It is a negative provision in terms, and the only purpose it can serve is to characterize and indicate the construction to be given to the entire portion of the statute relative to election of commissioners, and so require the court to give a strict construction to it, and pre-

vent anything from being read into the statute not already found therein. Our court has construed similar language in election statutes to this effect. See *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95, construing the registration statute that "no votes shall be received at any election," unless the voters were registered in cities wherein the registration laws apply. This is held to be not a permissive phrase, but a mandatory direction. The same intent is here apparent in the same class of statutes as this, also is an election regulation. Negative words in a grant of power are never construed as merely directory. *Sutherland*, Stat. Constr. Secs. 611 and 627; *Bladen v. Philadelphia*, 60 Pa. 464, 465; *Fitzmaurice v. Willis*, *supra*, and many authorities therein cited.

Then again, in no election under our scheme of state government have we a provision whereby cumulative voting is sanctioned. If the section under discussion was intended to permit this procedure, unheard of and unknown so far as our election machinery is concerned, would they not have, in departing from usual precedent, been as particular in framing this statute as to this radical departure from the ordinary, as they have been throughout the same statute in all other matters, not leaving something so radically new dependent for its existence upon a peculiar and forced construction. If the statute is not explicit, but ambiguous, this feature alone is sufficient from which the court would be compelled to construe it as not carving out a new system for elections, but rather as referring to existing conditions. In this connection the words of Chief Justice Marshall in *United States v. Fisher*, 2 Cranch, 358, on page 390 thereof (2 L. ed. 304, 314), construing a statute where a similar unusual court interpretation of it was sought, apply with as much force and as aptly as though he was deciding the case on trial. The words of the eminent chief justice are: "Where rights are infringed, where fundamental principles are overthrown, where the general system of law is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." But the legislature must be understood to mean what it has plainly expressed. If the legislative intent is plainly expressed, so that the act, read by itself or in connection with other statutes pertaining to other subjects, is clear, certain, and unambiguous, the courts have only the simple, obvious duty to enforce the law according to its terms. When a statute is passed as

a whole, and consisting of parts or sections, it is animated by a general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section, and so as to produce a harmonious whole. The general intent should be kept in view in determining the scope or meaning in any part, and this general intent is the giving to the meaning of all the parts the intention of the whole act controlling the interpretation of the several parts. 2 Sutherland Stat. Constr. chap. 13. Under the foregoing rules for construction of statutes as above applied, this statute is a definite, precise, clear definition of the right of the voter in the manner of choosing the board of city commissioners.

Nor is this all. We have other forcible reasons for holding that the legislature did not intend to permit cumulative voting in this solitary instance. The statute generally declares with exactness and nicety all matters regarding the manner of exercising the right of franchise. Safeguards are thrown about the voter that a free exercise of this right may be had. Such is the object of our Australian ballot system, and with this intent the legislatures have ordinarily prescribed even to the form of the ballot, and provided that in cases where not prescribed with exactness, general laws apply. The voter must place his cross indicating his intention to vote in the prescribed place required on the ballot, to be regarded as an expression of his intention, and this when he can vote but once for any one candidate for one office. Would it not be strange, then, that the legislature should, had they intended this statutory provision to have granted a new and untried right in suffrage matters, entirely omit to prescribe more definitely the manner of its exercise as to where or how the voter should mark his ballot? Rather would they not instead have prescribed how the ballot should be prepared, where the voter should mark it to express his intention, and stated somewhere in the measure that the voter could vote more than one vote for one candidate if he so desired? If this statute be held to grant the right of cumulative voting, there is no form of ballot prescribed or provided for in the exercise of that right; and this important matter is left to the caprice of the officer preparing the ballot in the first instance, then to the conjecture of the elector in voting, and finally to the uncertain discretion of election officers counting results. All this is significant, when considered in connection with the precision and exactness of the whole chapter in question, condemning such a construc-

tion leading to such uncertainty, manifestly contrary to expressed legislative intent.

As shedding further light on this matter, let us trace the origin of the statute as to commission form of government, to determine from where the chapter was taken, and then again from what § 15 of the statute was procured. It is significant that nowhere in the Galveston charter is cumulative voting permitted, nor is it permitted under the Iowa statutes for the organization of city government under the commission form. We have searched in vain for any cumulative voting privilege under statutes granting commission system of government for cities. Our statute follows, and to a considerable extent is patterned after, the Galveston charter, and also contains some features of the Iowa general statute as to such matters. In neither state is cumulative voting permitted, so the system was not borrowed with a cumulative voting provision a part thereof. We find in Illinois, however, two statutes of nearly the same wording, both by their terms expressly and definitely granting in exact words the right to vote cumulatively. The first applies to election of members of the legislative assembly of Illinois, found in vol. 1, page 123, of the Statutes of Illinois, as follows: "House; minority representation. The house of representatives shall consist of three times the number of the members of the senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district. . . . In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same or equal parts thereof among the candidates as he shall see fit, and the candidates highest in votes shall be declared elected." It is noticeable that, while the phraseology of this section is similar, yet if our statute was patterned after it in such respect, the omission of the words "for one candidate" and the phrase "or equal parts thereof" would thereby evidence a legislative intention against cumulative voting by the omission of the very provisions making cumulative voting definite and certain, or, in other words, granting it.

However, if the statute is patterned after the Illinois statutes, chap. 24, pt. I, article four, of vol. 1, of the Statutes of 1896, again a significant omission occurs. This article provides in express terms at length as to how cities may by vote provide for a minority representation in the city council by the election of aldermen under the minority

plan, which statute, however, has carefully outlined the object as that of procuring minority representation on such council, and how it should be adopted, and contains in § 55 thereof, on page 688 of said statutes, the following: "Aldermen; minority plan. Every such district shall be entitled to three aldermen who shall hold their office for two years, and until their successors shall be elected and qualified. At the first general election for mayor after the passage of this act, and every two years thereafter, there shall be elected in each ward as many aldermen as such ward shall be entitled to. . . . In all elections for aldermen aforesaid, each qualified voter may cast as many votes as there are aldermen to be elected in his district, or may distribute the same or equal parts thereof among the candidates as he shall see fit, and the candidate highest in votes shall be declared elected." It is noticeable that, while the phraseology is similar to our statute in question, the statute must be read in connection with the context, and in the light of declared minority representation, and containing the words "or equal parts thereof," and aided in construction by the provision for minority representation in the legislative assembly still more particularly declaring cumulative voting, and the Illinois Constitution amended purposely to permit cumulative voting; all taken together leave the construction of the Illinois statute beyond question. The object of said statutes is declared to be the granting of minority representation in the general assembly and in the city councils. There is no question of the intent of the lawmakers, and no question of statutory construction. In construing our statute can we conclude beyond question that the same was borrowed or patterned after those of Illinois quoted, with the purpose of granting cumulative voting, while the very words giving certainty to those acts, providing therefor, and declaring the intent to be minority representation, were omitted? If so, they were purposely omitted, that the intent should not be that of said statutes, and that cumulative voting should not be ingrafted even by construction into the new experimental law for the commission system of city government. Nor can we believe that, if our statute corresponds in peculiarity of phraseology to either of the ones quoted, such omission of this material feature of those statutes, bearing directly on cumulative voting, was accidental.

Our construction of the statute is aided and fortified by the very theory of representative government itself, as well as the history of our commonwealth since prior to statehood; all of which it is no violent



presumption to conclude the legislative body, whom we intrust with promulgation of our laws, keep in mind. We have stated that nowhere have we a provision for cumulative voting in state, county, or municipal governments. On the contrary the fundamental idea underlying the elective franchise has always been one of the exercise of a privilege of choice, as well as the exercise of individual power incidental thereto; that each voter is privileged to make his single choice for each elective official. That each voter should have equal rights under the law, not only to exercise an equal power, but to manifest equally his choice that the election reflect the will of the majority, whose will so exercised to that extent is law. That no double right of suffrage is granted to any one individual, but that every voter have the privilege of exercising his ballot in the same manner, with the same effect, under the same plan, for the same purpose, with no greater power than that of any other qualified voter. Every elector is then, as respects the ballot, the peer of every other elector. Equality under and before the law has applied in the past in the exercise of franchise as well as in all other governmental rights and privileges.

In this connection it is interesting to note that members constituting our constitutional convention were elected under a minority representation plan. See § 3, enabling act (Act Feb. 22, 1889, chap. 180, 25 Stat. at L. 676). And such convention was organized throughout on the plan of representation to the minority party; and during such convention a scheme of minority representation was urged. The system above referred to, then in vogue in Illinois, for election of members to the general assembly, was referred to and sought to be made a part of our Constitution by a portion of the convention, but the proposition was lost, and as a result no authority for minority representation appears in our state Constitution as to governmental matters. See Debates of Constitutional Convention of 1889, page 347. As further proof that minority representation, of which cumulative voting is but one method thereof, was in the minds of the framers of our Constitution when in convention assembled, we find § 135 of our Constitution providing: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer." Had the legislature cumulative voting in mind when they passed chapter 45 in 1907, they could have found no more apt words to de-

clare the same, had they so intended, than in § 135 of the Constitution above quoted. In the light of the history of this state, we may conclude, without passing upon the constitutionality of this act, that the legislature did not, if they had an eye to the past, intend to declare cumulative voting permissible by § 15 of chapter 45, Sess. Laws 1907.

Respondent claims there is no duty resting upon him to prepare the official ballots to be used in the election, and, accordingly, this court is without authority to interfere with his contemplated action, in that it is beyond the scope of his official duty. Granting his threatened act to be in excess of his official duty, it is because thereof no less an illegal act, if performed, than the erroneous performance of duties enjoined by statute. An illegal act of commission is no less illegal than such an act of omission. But we are satisfied relator is under a duty placed upon him by statute to furnish legal ballots and election supplies necessary for use in such election. Section 14 of the act providing for commission government for cities requires the city auditor to give notice of this election, and further provides that "in all other respects such election shall be conducted as prescribed by general laws, except that no registration of voters shall be required unless provided for by ordinance." Section 39 of the same act, under the heading of "City Auditor; powers and duties," prescribes: "He shall have such power and authority, and perform such duties, as auditors of cities and villages may be required to perform under the general laws." Under this statute it is plain that the powers and duties resting upon the auditor are the same as those required of auditors in cities and villages, without regard to the commission form of government. And under the general law existing prior to the passage of this statute, and in perfect harmony therewith, we find, in § 618 of the Revised Statutes of 1905, the following: "The municipal or city auditor or clerk, as the case may be, shall prepare and direct the printing and distributing of all ballots for municipal or city elections, and for all questions that may be submitted to a vote of the electors of such municipality." As there is no officer officially designated as clerk in municipal government of cities, and as the statute is framed also to cover elections in civil townships and school districts, it is plain that the duty mentioned by the statute rests upon the city auditor, and on no other official. For the foregoing reasons a writ should issue herein, directing the city auditor to prepare and distribute for the use of the electors in such election a

legal ballot with petitioner's name thereon as a candidate for city commissioner, and that such ballot contain a direction that the elector shall be instructed to vote for two only of the candidates for such office, and that the words "or two votes for one" be omitted from such direction to the voter, cumulative voting at such election not being permitted by law. Accordingly it is so ordered.

All concur excepting MORGAN, Ch. J., not participating, Hon. W. C. CRAWFORD, Judge of the Tenth Judicial District, sat by request.

SPALDING, J. (concurring). While I concur in the conclusion arrived at in the foregoing opinion, I wish also to say that in my judgment the provision of the statute complained of, if it does contemplate minority representation by the method of cumulative voting, is invalid. Similar provisions in principle have been passed upon by the courts of a number of the states, and have generally been held unconstitutional. It is true that the method of voting in some such states was restrictive rather than cumulative, but both methods have as the object the permitting of minority representation, and the principle is practically the same whether it is done by means of restricting the voter to voting for candidates for a part of the offices, or permitting his vote to count as more than one for some of the candidates. The result is attained in one instance by division and in the other by multiplication. The theory of cumulative voting without constitutional permission rests upon a false or fictitious premise. It assumes that the computation of the number of marks placed upon a ballot in favor of a candidate should determine whether he is elected, when in fact the marks are, and can only be, representative of persons possessing certain qualifications. The end sought is to determine how many persons who have registered their preference by voting in favor of the election of a particular candidate, and the number of such persons cannot be increased or diminished by any false or fictitious system of marking the ballots. The placing of marks upon the ballot is only a method of enumerating persons, and if the number of persons desiring the election of a named candidate can be multiplied by two by the fiat of the legislature, it can, by the same means, be multiplied indefinitely. Our system of government is based upon the doctrine that the majority rules. This does not mean a majority of marks, but a majority of persons possessing the necessary qualifications, and the number of such persons is ascertained by means of an election.

The subject is a most interesting one, and would bear more extended discussion, but I submit that the objections offered are fundamental and controlling, regardless of all theories of those who would, by means more or less indirect, make it possible for a minority to secure representation where not entitled to it under our system.

FISK, J. (concurring specially). While I concur in the conclusion that the writ should be issued, I am unable to agree with my associates upon the reasons set forth in the majority opinion. I deem it needless to enter into any extended discussion of the views which I entertain, and will content myself by merely stating that in my opinion the statute in question clearly evinces a legislative intent to adopt the cumulative method of voting for city commissioners. I am unable to construe said statute as expressing any other purpose.

I am equally convinced that, such being the legislative intent, the statute is unconstitutional. My views on this question are fully expressed by Champlin, Ch. J., in *Maynard v. First Representative Dist.* 84 Mich. 228, 11 L.R.A. 332, 47 N. W. 756, and cases cited. See also McCrary, *Elections*, 4th ed. § 212, and general note on the subject of *Minority Representation* on pages 158-160.

In the constitutional convention an unsuccessful effort was made to adopt the rule of minority representation in the election of members of the house of representatives in this state. See *Debates, Constitutional Convention*, pp. 347-349. It is a significant fact that the only place in the Constitution recognizing the right of cumulative voting is in § 135, relating to elections of directors and managers of private corporations, and I think it clearly apparent that it was the intention of the framers of our Constitution to restrict such right to such elections, and to none others.

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## STATE OF NORTH DAKOTA v. CHARLES WHITE.

(131 N. W. 261.)

### **Criminal Law—Attorney General's Authority to File Information.**

1. Following former decisions of this court, the Attorney General of the

state has authority in law to act as informant and file criminal information in district court without a showing of reasons therefor, or without showing reasons why the state's attorney of the county does not so act; and defendant's motion to quash the information so filed on such ground was properly denied.

**Criminal Law — Trial Judge — Affidavit of Prejudice — Right to Charge — Place of Trial.**

2. The filing of an affidavit of prejudice against both the presiding judge and the county does not divest such trial judge of authority to order a transfer of the action to another county for trial.

**Criminal Law — Intoxicating Liquors — Information — Nuisance.**

3. A criminal information in a prosecution for keeping and maintaining a common nuisance, a saloon, need not describe with particularity the place of its alleged commission. An information charging the crime as having been committed at "a certain place located in the city of Bismarck in said county and state" sufficiently designates the place when no abatement of nuisance is sought or property liened for fine and costs.

Opinion filed April 20, 1911.

Appeal from the District Court of McLean county; *Kneeshaw, J.*, after transfer from Burleigh county, *Winchester, J.*

Affirmed.

*W. L. Smith*, for appellant.

Information alleging nuisance must describe the place. *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

No judge against whom an affidavit of prejudice is filed can make further order than to call in another judge. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848; *Swepson v. Call*, 13 Fla. 337; 23 Cyc. Law & Proc. pp. 598 and 593.

*Andrew Miller*, Attorney General, *Alfred Zuger*, Assistant Attorney General, *R. N. Stevens*, State's Attorney, and *J. E. Nelson*, for respondent.

Attorney General may sign and file information. *State ex rel. Miller v. District Ct.* 19 N. D. —, 124 N. W. 417; *State v. Heiser*, 20 N. D. 357, 127 N. W. 72.

Particular description of place unnecessary when abatement of nuisance is not sought. *State v. Kruse*, 19 N. D. 203, 124 N. W. 385; *State v. Ildvedsen*, 20 N. D. 62, 126 N. W. 489; *State v. Empting*,

21 N. D. 128, 128 N. W. 1119; State v. Albertson, 20 N. D. 512, 128 N. W. 1122.

Goss, J. This is an appeal to this court from a judgment of conviction finding the defendant guilty of keeping and maintaining a common nuisance. The information was laid by the Attorney General of this state as informant. The defendant moved to quash and set aside the information on the ground that the Attorney General was not authorized by law to act as such informant, in the absence of a showing made as to why the information was not filed by the state's attorney of Burleigh county, wherein such proceedings were had.

The motion to dismiss was overruled, and properly so, as has been settled by the decisions of this court since the ruling of the trial court complained of. That the Attorney General of the state is authorized by law to so act, see State ex rel. Miller v. District Ct. 19 N. D. —, 124 N. W. 417; and State v. Heiser, 20 N. D. 357, 127 N. W. 72, and authorities therein cited. The action of the trial court, accordingly, was proper.

Thereafter the defendant interposed a demurrer to the information, and forthwith filed an affidavit of prejudice against both the presiding judge of the district court and the county in which said action was pending. The court thereupon immediately granted a change of venue to the county of McLean, and to this ruling the defendant excepts and thereon predicates error urging that, upon the filing of the affidavit of prejudice the jurisdiction of the presiding judge ceased for all purposes, including his authority to transfer the case for trial to another county.

Such contention cannot be sustained. Section 9929 of the Revised Codes of 1905, in subdivision 1 thereof, provides that under such circumstances "it shall be the duty of the court to order such action removed for trial to some other county or judicial subdivision in this state, as provided in this article, and to request, arrange for, and procure some other judge than the one objected to, to preside at the trial of said action." The statute is conclusive against the position taken by defendant's counsel as to such assignment of error.

Defendant alleges error in the overruling of his demurrer to the information. The charging part of the information charges the nuisance to have been kept and maintained "at a certain place located in

the city of Bismarck, in said county and state," without more specifically charging the place. The demurrer is leveled particularly at the failure of the information to specify more particularly the location of the place of commission of the crime. The information in all other particulars is not open to criticism, nor is it on this score. No judgment for the abatement of the nuisance was pronounced, nor was any property lien ed thereunder. The place was designated with sufficient certainty. The state is not obliged to charge the place of the commission of the crime with any more particularity than as charged, and under this allegation as to place could prove the keeping and maintaining of a place as a common nuisance within the city of Bismarck, and convict the defendant of the crime of keeping and maintaining the same. This is so well settled by the decisions of this court, that it is unnecessary to cite decisions from other states on this question. See *State v. Ball*, 19 N. D. 782, 123 N. W. 826; *State v. Ildvedsen*, 20 N. D. 62, 126 N. W. 489; *State v. Kruse*, 19 N. D. 203, 124 N. W. 385.

This disposes of all the assignments of error adversely to the defendant. The judgment appealed from is affirmed, and it is so ordered..

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## HATTIE E. HARRINGTON v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation.

(34 L.R.A.(N.S.) 373, 131 N. W. 246.)

### Statutory Construction — Life Insurance — Policy — Dating Back.

1. Construing § 5948 of the Revised Codes of 1905, *held*, that the company cannot be permitted to show that the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment of the receipt of the premium.

### Insurance — Life Insurance — Suicide.

2. In such case, the date of the policy as specified in the contract being binding on the company, *held*, that under the provisions of § 6064 of the Revised Codes of 1905, the defense that the insured committed suicide can-

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Note.—As to suicide while sane as a defense to an action on a policy containing no provision as to effect of suicide, see note in 8 L.R.A.(N.S.) 1124.

As to effect of words, "sane or insane," in a suicide clause, see note in 17 L.R.A.(N.S.) 260.

not be set up, when suicide occurs after the expiration of one year from the date of the policy.

**Insurance — Life Insurance — Suicide.**

3. Where the insured commits suicide while sane, after the expiration of one year from the date of the policy, the company is liable for the amount of the policy even though it appeared that the act of suicide was premeditated before the expiration of one year from the date of the policy, and even though the date of the liability of the company is fixed by the voluntary act of the insured, this being one of the risks assumed by the company, where, as, in this case, the policy contains a provision that the company shall not be liable in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy.

Opinion filed April 21, 1911.

Appeal from District Court, Grand Forks county; *Templeton, J.*

Action by Hattie E. Harrington against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals.

Affirmed.

*Ball, Watson, Young, & Lawrence*, for appellant.

The policy evidences the contents. *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63; *McMaster v. New York L. Ins. Co.* 40 C. C. A. 119, 99 Fed. 856; *Logan v. Provident Sav. Life Assur. Soc.* 57 W. Va. 384, 50 S. E. 529; *Hutson v. Jensen*, 110 Wis. 26, 85 N. W. 689.

The word "issued" as applied to the policy means the beginning of contractual relations under it. *Coley v. Lewis*, 91 N. C. 23; 4 Words & Phrases, p. 3781; *Corning v. Meade County*, 42 C. C. A. 154, 102 Fed. 57; *Folks v. Yost*, 54 Mo. App. 59; *Homestead F. Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463; *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388; *Sisk v. Citizens' Ins. Co.* 16 Ind. App. 565, 45 N. E. 804; *Orcutt v. Moore*, 134 Mass. 52, 45 Am. Rep. 278; *Styles v. Wardle*, 4 Barn. & C. 908, 7 Dowl. & R. 507, 4 L. J. K. B. 81, 28 Revised Rep. 501; *Houston, E. & W. T. R. Co. v. Keller*, 90 Tex. 214, 37 S. W. 1062; *Logsdon v. Supreme Lodge, F. U.* 34 Wash. 666, 76 Pac. 292; *Pease v. Ritchie*, 132 Ill. 638, 8 L.R.A. 566, 24 N. E. 433; *Spencer v. Myers*, 73 Hun, 274, 26 N. Y. Supp. 371.



Suicide contemplated by assured, when risk is assumed, renders the insurer not liable. *Hopkins v. Northwestern Life Assur. Co.* 94 Fed. 729; *Weber v. Supreme Tent*, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83; *Davis v. Supreme Council R. A.* 195 Mass. 402, 10 L.R.A.(N.S.) 722, 81 N. E. 294, 11 A. & E. Ann. Cas. 777; *May*, Ins. 2d ed. p. 443; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Borradaile v. Hunter*, 5 Mann. & G. 653, 5 Scott, N. R. 418, 12 L. J. C. P. N. S. 225, 7 Jur. 443; *Blackstone v. Standard Life & Acci. Ins. Co.* 74 Mich. 593, 3 L.R.A. 486, 42 N. W. 156; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139; *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Amicable Soc. v. Bolland*, 4 Bligh, N. R. 211, 2 Dow & C. 1.

*Guy C. H. Corliss*, for respondent.

The year's period began with the date of the policy. *Gage v. McCord*, 5 Ariz. 227, 51 Pac. 977; *Bement v. Trenton Locomotive & Mach. Mfg. Co.* 32 N. J. L. 513.

Doubt as to construction of a policy is resolved against the insurer who selected the language. 25 Cyc. Law & Proc. p. 739; *Mareck v. Mutual Reserve Fund Life Asso.* 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68; *Grier v. Mutual L. Ins. Co.* 132 N. C. 542, 44 S. E. 28; *Franklin Ins. Co. v. Villeneuve*, 25 Tex. Civ. App. 356, 60 S. W. 1014; *Mutual Reserve Fund Life Asso. v. Payne*, — Tex. Civ. App. —, 32 S. W. 1063; *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980; *Rayburn v. Pennsylvania Casualty Co.* 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762; *Mutual Reserved Fund Life Asso. v. Austin*, 6 L.R.A.(N.S.) 1064, 73 C. C. A. 498, 142 Fed. 398.

As to contractual purposes, recital of payment in a policy is binding upon the insurer. Rev. Codes 1905, § 5948; *Grier v. Mutual L. Ins. Co.* 132 N. C. 542, 44 S. E. 28; *Kendrick v. Mutual Ben. L. Ins. Co.* 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

An insurance company may date back its policy, receive pay for the elapsed period, and deem it in force from such date. 2 May, Ins. Sec. 21 N. D.—29.

400; *Rayburn v. Pennsylvania Casualty Co.* 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762; 25 Cyc. Law & Proc. p. 742.

Beneficiary is not affected by the secret suicidal purpose of assured. *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980; 25 Cyc. Law & Proc. p. 881; Cases in note to 8 L.R.A.(N.S.) 1124; *Supreme Conclave I. O. H. v. Miles*, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845; *Lange v. Royal Highlanders*, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110.

The motive with which an act, otherwise lawful, is committed, does not render such lawful act unlawful. *Boyson v. Thorn*, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; *Fisher v. Fielding*, 67 Conn. 91, 32 L.R.A. 236, 34 Atl. 714; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *People ex rel. Tibbits v. Canal Appraisers*, 13 Wend. 360.

BURR, District Judge. This action involves a question of the liability of the defendant herein upon a life insurance policy issued by the defendant to one Charles E. Rich, in which policy the plaintiff herein is named as beneficiary. The policy is dated May 9th, 1908, and is in the sum of \$1,000. It is not necessary to set forth the pleadings in detail, as almost all of the facts are admitted by the parties. The answer of the defendant, however, in three paragraphs thereof, sets forth statements which the trial court failed to find as facts in this case, which failure is assigned as error. These paragraphs are as follows:

Paragraph 5: "Defendant further alleges that said Charles E. Rich committed suicide on the 11th day of May, 1909, and, as a result of said act on his part, died on said 11th day of May, 1909; that said act of suicide was committed while said Charles E. Rich was sane, and was with the deliberate intention of taking his own life, and was committed by said Charles E. Rich on that particular date in contemplation of the expiration of one year from the date of said policy, and for the purpose of creating a liability upon the defendant under the terms and conditions of said policy of insurance; that said Charles E. Rich intentionally, and for the fraudulent purpose of creating a liability against the said defendant, waited until the expiration of one

year from the date of said policy for the purpose of creating a liability thereunder against the defendant."

Paragraph 7: "Defendant further alleges that the period of one year from the date of the execution and signing of the said policy by the defendant, or from the date of the said application of the said Charles E. Rich, did not expire until the 19th day of May, 1909, eight days subsequent to the date of the suicide of the said Charles E. Rich."

Paragraph 8: "That the said defendant received no benefit nor consideration for the affixing of the date of said policy of insurance as of a date previous to the actual signing and execution thereof."

Among the undisputed facts in this case, we find that the insured was born November 13, 1865; premium based on age; that on the 18th day of May, 1908, he made his written application to the defendant for a policy of life insurance in the sum of \$1,000, and that said application was, in due course, forwarded to the head office of the defendant and was duly accepted by the defendant, and the defendant duly issued and delivered to the said Charles E. Rich the said insurance policy, which policy was delivered on or before the 1st day of July, 1908; that for the conduct of its business, defendant from time to time "issued rules and regulations and instructions for the local agents, to guide them in the reception of applications," and at the time this application was received one of the said rules of the said company in force was as follows:

"Insurance age; dating back.—The insurance age is determined by the birthday of the insured closest to the date of the policy (which is the same as that of the examination). Where the age has recently changed it is sometimes possible, by the applicant's request embodied in the application, to have the policy dated back a few days in order to give the applicant the benefit of the rate of a younger age;" that the written application made by the said Charles E. Rich, as aforesaid, contained the following statement and request: "The premiums are to be paid semiannually. First premium, May 9th, 1908." Also: "It is hereby warranted and agreed that I will not die by my own hand, whether sane or insane, during the period of one year next following the said date of issue;" that the said policy of insurance, delivered to and accepted by the said Charles E. Rich, contained the following clause and addition: "Suicide. The company shall not be liable hereunder in the event of the insurer's death by his own hand,

whether sane or insane, during the period of one year after the issuance of this policy, as set forth in the provisions of the application indorsed hereon or attached hereto;" that the said policy contained the following clause and condition: "This policy and the application heretofore, a copy of which is indorsed hereon and attached hereto, constitute the entire contract between the parties hereto;" that the defendant dated the said policy of insurance as of the date, May 9th, 1908, and by reason thereof the insured received the benefit of a lower premium, and that said lower premium amounted annually when at the age of forty-two years, to \$16.04; and the semiannual premium, to \$8.34; but that the premium rate at the age of forty-three is \$16.30 for the annual premium and \$8.58 for the semiannual premium; that the defendant accepted from the said Charles E. Rich the semiannual premium of \$8.34 as a premium upon the said policy from May 9th, 1908, to November 9th, 1908, and the further sum of \$8.34, as the semiannual premium on said policy, from November 9th, 1908, to May 9th, 1909; that on the 10th day of May, 1909, said Charles E. Rich paid defendant the sum of \$8.58, as and for the semiannual premium upon the said insurance policy for the period from May 9th, 1909, to November 9th, 1909, and the defendant duly issued and delivered to the said Charles E. Rich its receipt for the said semiannual premium, as follows:

The Mutual Life Insurance Company of New York hereby acknowledge receipt of premiums on said policy. Policy No. 17367639. Premium \$8.58 for one half year, due May 9th, 1909.

Countersigned May 10th, 1909, at Fargo, No. Dak.

W. A. Smith, Manager.

Per J. C. Whitney, Agency Cashier.

W. J. Easton, Secretary.

that the provisions of the said life insurance policy are all in printed language, prepared by the defendant, and that the warranty on the part of the insured that he would not commit suicide during the period stated was in printed language, prepared by the defendant in making out its form of application for insurance; that the said Charles E. Rich committed suicide on the 11th day of May, 1909, dying on the said date; that the said Charles E. Rich, at the time that he com-

mitted suicide was sane; that according to the terms of the policy, thirty days grace were allowed the insured in which to pay any premium after the first premium, and all premiums were payable in advance at the home office of the defendant, or to any agent of the company, upon delivery on or before date due of a receipt signed by the secretary of the company or other executive officer, and countersigned by said agent; that the plaintiff herein is the sister of the insured; that after the death of the insured the said plaintiff made due proof of the death of the said Charles E. Rich; said proof was duly received and accepted by the defendant as sufficient proof of his death on the 4th day of June, 1909, and was passed upon by the defendant at that time; that the defendant disclaimed any liability under the terms of said policy, and refused to pay the insurance to the plaintiff, upon the ground that the defendant was not liable, because that the insured committed suicide "during the period of one year after the issuance of the said policy as set forth in the provision of the application and policy," and for grounds other than sufficiency of the proofs of loss; that this action was commenced on or about September 1, 1909.

In the trial of the case the defendant submitted the testimony of one E. L. Richter, who testified in substance that he had been acquainted with the insured for between twenty-five and thirty years, and that witness and insured were good friends, which friendship continued up to the day of his death; that on the 27th day of April, 1909, witness had a conversation with the insured at the office of the witness, at Larimore, at which time they were discussing the financial affairs of the insured, and some life insurance policies which the insured had, payable to his daughter, Hattie E. Rich; that the insured said to him that he wanted to raise money on his life insurance policies in order to remedy his financial difficulties; that at said time the witness and the insured discussed the suicide clause in the policies, and the insured stated that the clause ran out somewhere between the 7th and the 9th of May, and that as soon as the said clause expired he, the insured, would kill himself, but that he wanted to wait until after the year had expired, so as to be sure that his daughter would get his insurance; and that he would commit suicide within a day or two after the expiration of the suicide clause; that the insured did not appear to have been drinking or be intoxicated at that time, and that

witness did not, at any time, communicate any of these matters to the plaintiff herein, nor to a brother of the insured, and that at said time he was pretty well acquainted with the brother and had met the plaintiff.

Upon the evidence in this case the trial court found, as a matter of law, that the plaintiff was entitled to judgment for the full amount of the policy, to wit: \$1,000, with interest thereon from the 4th day of June, 1909, at 7 per cent, and judgment was accordingly entered. A motion for a new trial was made and denied, and the defendant prosecutes its appeal to this court from the said order for judgment and order denying motion for a new trial, and in its assignments of error set forth that the trial court erred, in failing to find as true the facts alleged in ¶¶ 5, 7 and 8, of the defendant's answer; in making the conclusion of law in which the plaintiff is entitled to judgment as hereinbefore set forth, in ordering and granting judgment in favor of the plaintiff and against the defendant; and in additional assignment of error sets forth that the court erred in denying the motion for a new trial on the following grounds: 1. The evidence is insufficient to support the judgment, in that it appears affirmatively by the pleadings and evidence in said case that Charles E. Rich, the insured, committed suicide within the period of one year from the issuance of the policy of the insured; and that the policy of insurance issued to said insured thus became void and unenforceable.

2. The evidence is insufficient to support the judgment in that it appears affirmatively in the testimony in said action, that the insured committed a deliberate fraud against the insurer, and by his deliberate act while sane determined the rights and liabilities of the parties to the contract of insurance; and that the said insured intentionally and for the fraudulent purpose of creating a liability against the said defendant company, insurer, waited until the expiration of one year from the date of said policy for the purpose of creating a liability thereunder against the said defendant company, insurer, and that by reason of said fraud said policy became void and unenforceable.

Two propositions are presented to us by the appellant, quoting from its brief: "First, is the defendant company liable upon a policy of insurance in case of the death of the insured by suicide in less than a year from the time of the issuance of the policy, although an artificial period of more than one year is produced because of the dating back

of the policy at the request of and for the benefit of the insured?" Second, "Is the defendant company liable upon a contract of insurance, because of death by suicide of the insured, where it appears that such act of suicide was premeditated and the date of the liability, if any, of the defendant company is fixed by the voluntary and fraudulent purpose and act of the insured?"

At the outset we may state that the facts show the dating back of the policy from the date of the application, May 18, 1908, to the alleged date of the execution of the policy; to wit, May 9, 1908. While done at the request of the insured, it was done in accordance with general rules and instructions issued to agents in general, and not for the sole and specific benefit of this insured, nor was it for the sole benefit of the insured as against the company; for while the insured received a reduction of some 48 cents in his premium for the first year, yet the company received the benefit of insuring the insured during eight days already passed when there could be no risk assumed by the company in fact.

The first proposition presented to us raises the question of the date of the policy. On its face the policy is stated "to be executed this 9th day of May, 1908." The general rule is that a policy of life insurance, if delivered, takes effect from its date unless it be otherwise stated. See May, Ins. 2 ed. § 400. If it be alleged that the contract takes effect at some other date, then evidence of this contrary intent must be shown. Of course, the burden of introducing such evidence would be upon him who alleges it.

In 25 Cyc. Law & Proc. p. 742, the rule is laid down that the risk is presumed to commence from the date of the policy, in the absence of any provision or agreement to the contrary. This rule is the same as the one set forth in the case of Union Ins. Co. v. American F. Ins. Co. 107 Cal. 328, 28 L.R.A. 692, 48 Am. St. Rep. 140, 40 Pac. 431. In Rayburn v. Pennsylvania Casualty Co. 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762, the court says: "Where insurance is applied for and afterwards a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the company assumes the risk after the date of the policy." A careful examination of the record fails to disclose any intent contrary to this rule. If we assume, without reference to § 5948 of the Revised Codes, that the defendant is in position to raise the question as to the actual date of the

policy, and the evidence is that the actual date is some time subsequent to the stated date of execution, yet it appears clearly from the record that it was the intent of the parties to date the policy as of the date stated. The company makes provision for such dating. The insured in this case was forty-two years six months and five days old, and accordingly was ratable of the insurance age of forty-three years. Had he been six days younger, he would have been ratable of the insurance age of forty-two years, which would have given him a slight reduction in his premium for the year 1908 of 24 cents semiannually. To get this benefit, the policy was dated back some nine days, which would be as of three or four days less than forty-two years and six months old. The company got the benefit of this, for it is a certainty of life on which they assumed no risk, and for which they were paid. Clearly it was the intention of the parties to make the date as of the 9th of May, 1908. The contract therefore was made as of May 9th, 1908.

Appellant says the fact that the company agreed to the dating back does not estop them from raising this question, because the dating back was but for one purpose, and that was the fixing of the date of payment of the premiums. We cannot agree with this in its entirety. The purpose for the dating back of the contract may have been to get a little less rate of premium; but the fact stands that the contract itself was dated back; that is, the whole contract, and not the portion alone dealing with the insurance rate. If the contention of the appellant were correct, the purpose could have been obtained by simply making the contract as of its correct date, but lowering the rate of insurance. Instead of doing this, the company maintains its uniform rate, but takes a retrospective risk.

Section 5948 of the Revised Codes of 1905, says: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." Indeed it has been held, even, in the absence of such a statute and in a case where a policy of insurance contained a provision, that the company should not be liable until the premium should be actually paid to the company, where also the policy contained a receipt for the premium that the company was estopped from setting up the nonpayment of the premium for the purpose of avoiding the instrument. The company might actually recover the premium, but, so



far as the contract was concerned, they were prohibited from setting up a nonpayment of the premium. *Basch v. Humboldt Mut. F. & M. Ins. Co.* 35 N. J. L. 429.

In the policy involved there is a distinct acknowledgment of the receipt of the premium, and therefore the defendant company cannot be permitted to offer any evidence to show that the policy was not binding. This expression, "to make the policy binding," necessarily means the contract in its entirety, as agreed upon by the parties, and it becomes immaterial whether the date is artificial or actual. The company cannot be heard to say that this actual contract entered into between the parties is not, for all contractual purposes, binding and conclusive.

That a company may contract to insure for a period already passed is well settled. See *Kerr, Ins.* pp. 100, 101, where it is stated "that the term of insurance may by stipulation begin upon the date of the application, and the policy when issued may be dated prior to the date of its execution, and cover risks which have occurred prior to that time. The intent of the parties, when ascertainable, should control." See also *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Philadelphia L. Ins. Co. v. American Life & Health Ins. Co.* 23 Pa. 65.

In *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268, where a company took a risk to commence previous to the date of the policy, the court said: "The company would be as much bound as if the loss occurred after the policy was delivered." This was a case involving a fire insurance policy, where the property was burned without the knowledge of either party, after the agreement to insure was entered into and before the policy was issued. See also *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379.

In *Lightbody v. North American Ins. Co.* 23 Wend. 18, it was held the company was liable on the policy even though not delivered for several days, and the property was destroyed before the date, but after the agreement to insure was entered into, and the policy was not delivered until two or three weeks after the date. To the same effect is *Whitaker v. Farmers' Union Ins. Co.* 29 Barb. 312.

In the case of *Davenport v. Peoria M. & F. Ins. Co.* 17 Iowa, 276, the court, independent of any statutory provision, states the rule, that "the doctrine that an act done at one time may take effect as of a prior time by relation back . . . is applicable to contracts of insur-

ance, the agreement to insure being the principal act; the payment of the premium and the formal execution of the policy may be concurrent therewith or subsequent thereto." Here was a case where a policy was not issued at the time the agreement to insure was made, and between the time of the agreement and the time of the issuance of the policy the property was destroyed, without knowledge of either party. There was no fraud or concealment by the party insured, and the question became simply one of what was the risk taken by the company. The court says: "The defendant seeks to avoid liability on this policy, by showing by parol that the policy was not in fact executed or delivered until the day after its date. The plaintiff then shows by parol that such antedate was not the result of accident or mistake, but was done intentionally and in pursuance of a previous contract between the parties. This parol testimony was clearly competent; . . . both that parties did exactly what they intended to do, and have put in writing, in a legal binding form, the mutual contract, between them and the obligations of the respective parties. Such a contract thus fairly entered into, both good morals and good law require shall be enforced, and the losses, if any, must fall on that party which for a valuable consideration voluntarily assumed the possible burdens of them."

That is the exact situation in the case at bar. The appellant made provision for and consented to a dating back of the policy, thus making it of the date it bears, rather than the actual date, receiving therefor the absolute assurance that they took no risk in that period dated back. The same rule is upheld in the case of *Kentucky Mut. L. Ins. Co. v. Jenks*, 5 Ind. 96-103. The appellant argues that, under the contract, parties could not have had in contemplation the dating back of the period during which the insured could not commit suicide, and alleges that because, in § 6064 of the Revised Codes of 1905, the legislature says: "It shall be no defense after the policy has been in force one year that the insured committed suicide." This must necessarily mean one year from the actual date of the policy. The purpose of that section is to prevent an insurance company from making a longer period than one year during which the defense of suicide may be set up, but does not prevent the company and the insured from shortening the period. Surely it would not be argued, if a company saw fit to eliminate the suicide exemption entirely or to expressly provide that the policy was incontestable from date as against the defense

of suicide, that, under the provisions of this section, the company could yet set up the defense of suicide if it occurred at any time within a year from the time the policy came in force. The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment of premiums. It is well settled that, where there is any uncertainty in the terms of an insurance policy, the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company. The company prepares the blanks, dictates the terms, and it would be idle to say that the insured need not accept the terms unless he sees fit. See *Schroeder v. Trade Ins. Co.* 109 Ill. 157; also *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644.

In its second proposition, defendant seeks to avoid liability, because the act of suicide was premeditated and the date of the liability of the company was fixed by the voluntary and fraudulent purpose and act of the insured. This is based solely upon the testimony of the witness Richter. It is clear from a reading of the policy that the company and the insured contemplated the possibility of the commission of suicide by the insured while he was sane. The fact is admitted that the insured committed suicide while sane. Therefore, of a surety his act was premeditated, but such premeditation was one of the risks assumed by the company, and if his suicide could be premeditated, though the period of premeditation may be short, the liability of the company must necessarily be fixed by the voluntary purpose and act of the insured.

To allow the company to set up the defense of suicide during the sanity of the insured, and the fixing of the liability by the voluntary purpose and act of the insured, would be practically to wipe out the provision fixed by our statute that the defense of suicide could not be set up after the policy had been in force one year. Since the insured was sane when he committed suicide, his act must necessarily have been voluntary and premeditated. There is nothing to show that the premeditation extended to a period prior to the application for the insurance; but even if it did, death by suicide is one of the risks that the company insures against.

Appellant claims that this premeditated act of suicide was fraudulent as against the company, and that the fraud is shown by the testi-

mony of the witness Richter. According to the testimony of this witness, however, the policy about which the insured was talking could not have been the policy in question, but was a policy which was payable to his daughter. But, independent of this fact, there is no merit in this contention. The liability of the company is not fixed by the time the intent to commit suicide becomes fixed and permanent in the mind, but is determined by the fact of suicide. Who knows the vagaries of the human mind? Who can tell how often between the 27th of April, 1909, and the 11th day of May, 1909, the insured contemplated and abandoned the purpose of suicide? He was shown to have been in financial difficulties; but there is no testimony showing of how long standing. Several times a day he may have determined to commit suicide, and then abandoned his determination.

Appellant in his brief says: "Plaintiff cannot recover in the face of this testimony upon general principles alone, for, if the testimony proves anything, it proves that the insured violated the contract, in that he intentionally created a liability against the defendant company. It certainly cannot be contended that the fixing of liability under a contract is within the sole power and control of one of the parties." In support of this he cites *Hopkins v. Northwestern Life Assur. Co.* (C. C.) 94 Fed. 729, and other cases. An analysis of this case shows that it was decided upon the assumption that the policy was silent entirely as concerning suicide. The court held, in that case, self-murder was not within the contemplation of the parties. This, however, is not the state of facts in the case at bar. The possibility of self-murder was taken into account, and, whether sane or insane, the insured was limited to a period of one year, and the company therefore obligated itself to pay, in case of suicide after the period of a year. It cannot be heard now to disclaim this liability because of the possibility that the insured may have contemplated suicide before the expiration of the year. The appellant cites *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. The policy in that case contained a clause that the insured warranted and agreed that he would not die by his own act, whether sane or insane, during the period of two years, which period was to begin on the 6th day of November, 1891. The insured committed suicide October 5, 1892. The court, however, goes on to decide that suicide is not in the contemplation of the parties when they enter into a policy of life insurance, stat-

ing that, "if a person should apply for a policy expressly providing that the company should pay the sum named if, or in the event that, the assured at any time during the continuance of the contract committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it, upon the death of the assured, should not be interpreted as intended to cover the event of death caused, directly and intentionally, by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life." This opinion was written in 1897, and it is a sufficient answer to this *dictum* to say that almost all of the insurance companies now write policies where the possibility of self-destruction while sane is clearly taken into account, and is among the risks assumed, some companies making a time limit and others not. Many states have statutes similar to our § 6064. It is no defense to say that life insurance imports a mutual agreement, whereby the assured is to do all in his power to prevent liability. The company knew that, so far as the agreement with the insured was concerned, and so far as their risks assumed were concerned, he was at liberty to commit suicide while sane, at any time after the period of limitation fixed by the contract. The morality of the fact is not involved in this case. The insured, by his self-destruction, has put himself beyond the realm of human law, and the morality of his act will be judged by a different court.

The event which happened having been without the contemplation of the parties, and the parties having voluntarily shortened the actual period during which, if the act occurred, the company would not be liable, we hold that the time limitation of the act of suicide had expired, at the time of the self-destruction of the insured, and that the company thereupon became liable for the full amount of the policy.

It follows, therefore, that the lower court committed no error in refusing to find as facts the statements set forth in paragraphs 5, 7, and 8 of the defendant's answer, as desired by the defendant, and the judgment of the lower court is, therefore, affirmed.

Honorable A. G. BURR, Judge of the Ninth Judicial District, sitting with the court by request.

## JOSEPH LANGER v. W. H. C. GOODE.

(131 N. W. 258.)

**Statutory Construction — Noxious Weeds — Action — Damages.**

1. Section 2086 of the Revised Codes of 1905 construed and held that no such duty devolves upon any person to destroy such noxious weeds as wild mustard upon the land he owns or occupies, as will make him liable for damages for failure to destroy until after the county commissioners have prescribed the time and manner of destruction. As to whether an action would lie after the commissioners have acted, not determined.

**Statutory Construction — Words and Phrases.**

2. The expression, "rights of another," in the maxim set forth in § 6661 of the Revised Codes of 1905, means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards.

Opinion filed April 21, 1911.

Appeal from District Court, Cass county; *Pollock, J.*

Action by Joseph Langer, as plaintiff, against W. H. C. Goode, as defendant. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

*J. F. Callahan* and *S. B. Bartlett*, for appellant.

*Smith Stimmel* and *Pollock & Pollock*, for respondent.

BURR, District Judge. This is an action in which the plaintiff seeks to recover from the defendant damages alleged to have accrued to him by reason of the plaintiff's alleged neglect to destroy wild mustard growing on his farm. The complaint, omitting the formal parts, is as follows: "That at all times hereinafter mentioned the plaintiff was the owner and in possession of certain tracts of land situated in the county of Cass, state of North Dakota, described as follows: [Here setting forth description.]

"2. That at all times hereinafter mentioned, the defendant was the owner and in possession of certain tracts of land situated in Cass county, North Dakota, and described as follows: [Here follows description

of the land adjacent and contiguous to the land described in paragraph 1.]

"That during the year 1908 the defendant, contrary to law and rights of the plaintiff herein, permitted certain noxious weeds, to wit, wild mustard, to grow and bear seed upon the premises owned by him and described in paragraph 2 of this complaint.

"That said seed so grown on the premises of the defendant, as heretofore set forth, was, during the years 1908 and 1909, blown on and across the land owned by this plaintiff, and described in paragraph 1 herein, and polluted and rendered foul said land and the crop grown thereon during the year 1909, and caused this plaintiff labor and expense in attempting to eradicate the same, and damaged the real property of this plaintiff, above described; all of which damage amounts to the sum of \$1,500, no part of which has been paid, and no demand has been made for the same.

"Wherefore, the plaintiff demands judgment, etc."

To this complaint the defendant demurred upon the grounds "that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action." The proposition involved being argued before the trial court, said court sustained the demurrer, and from the order sustaining said demurrer the plaintiff has appealed to this court.

The respondent in his brief raises the question as to how the plaintiff could know, "how can anybody know," that the wind blew the mustard seed from the defendant's land upon plaintiff's land, citing authority to the effect that "the wind bloweth where it listeth, and thou canst hear the sound thereof, but canst not tell whence it cometh or whither it goeth." This objection, however, would more properly be addressed to the character of evidence which may be introduced in proof of damage, if such a cause of action be maintainable, but is not properly before us on the demurrer, nor should we concern ourselves with the proposition; for, as the same authority has said, "sufficient unto the day is the evil thereof."

The question presented to us on the demurrer involves the construction of §§ 2086, 2088, and 2089 of the Revised Codes of 1905. The appellant in this case stands squarely for the rights which he claims he has under these sections, alleging that the defendant is guilty of a breach of duty imposed upon him by the statute, and that because of

said breach appellant has been damaged, invoking the rule in the law of torts, that where a duty is imposed upon a person by a statute which is designed primarily for the protection of other people, he is liable in damages to any person for whose protection this duty is imposed, resulting from neglect to perform any duty, where the damages sought to be recovered are of the character which the statute is designed to prevent.

It will be noticed that the complaint in this case does not allege that the board of county commissioners for the county of Cass, at any time during the years covered by the complaint, prescribed the time and manner of destroying noxious weeds, as provided for by § 2086, and it is expressly admitted by the appellant himself in his brief that the said board did not give the required notice. It is argued by the appellant that the defendant herein owed a duty to the plaintiff irrespective of any action of the board of county commissioners, and that, independent of the fact that the board may have failed to perform the duty imposed by the statute upon the defendant, the defendant had no right to permit a use of his property in such a way as would injure appellant. It is argued by the appellant that the act of the defendant was unlawful; that is, that it was unlawful for the defendant to omit to destroy the noxious weeds; and he cites, as ground for maintaining his action, § 6556 of the Code, which says: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." It becomes necessary for us, therefore, to determine whether or not, under the facts in this case, such a duty as hereinbefore referred to did devolve upon the defendant for the benefit of the appellant. At the outset it will be noticed that there is a difference between omitting to do something which is required to be done by the statute, and the doing of something which is prohibited by the statute. It is not contended that where a person fails to destroy noxious weeds upon any lands which he owned or occupied, there is a penalty prescribed by statute for such failure, so as to make the failure a criminal offense. Section 8760 of the Revised Codes makes it a crime to do any act the performance of which is prohibited by statute in cases where no penalty for the violation of the statute is imposed under any statute, but this section cannot be con-



strued so as to make it a criminal offense to fail to do an act which may be required by statute.

Section 6661 says: "One must so use his own rights as not to infringe upon the rights of another." That is but one of the many translations of the old maxims, *Sic utere tuo at alienum non lædas*. These maxims are merely aids to the construction, and, as Judge Engerud pointed out in *Carroll v. Rye Twp.* 13 N. D. 458-462, 101 N. W. 894, the damages recoverable under such maxim are not damages as for every injury, but such damages only for which the law gives redress; and, as counsel in *Jeffries v. Williams*, 5 Exch. 792, 20 L. J. Exch. N. S. 14, 3 Mor. Min. Rep 645, suggests, the injury guarded against is the injury to the rights of others, which means legal rights; otherwise, the more complicated civilization becomes, the more difficult it would be for a man to use or enjoy the use of his own property. The English courts appear to have carried the application of this maxim for the benefit of "others" to a much greater length than the American courts, and, in fact, all or almost all of our American writers agree that the English ruling cases, such as *Fletcher v. Rylands*, 37 L. J. Exch. N. S. 161, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129, have not been adopted as authority in our courts. The duty which a man owes to his neighbor in respect to his neighbor's legal rights widens in accordance with the beliefs and the age of the application of the rule. As we advance in civilization, and the principles of Christianity become more widespread,—for this maxim is but an application of Christian principles,—the duty which one man owes to another, no doubt, will enlarge and increase, and with this enlargement our legal system must keep pace; yet it must be conceded that almost invariably the highest, most delicate, and finest developed sense of duty and the best system of ethics have not been translated into the law of the land, and it is principally by change in legislation that the wornout legal ethics must be supplanted by the system that best expresses the moral genius of civilization.

How far, then, does the statute go in prescribing a duty to destroy noxious weeds and permitting recovery of damages for failure so to do? The appellant concedes that no such liability was incurred at common law, and relies, as he says, "upon the plain letter of the statute," which must be construed, of course, in the light of the maxim hereinbefore quoted. It is not claimed that the action of the defendant

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in permitting noxious weeds to grow amounts to a public nuisance, as defined in §§ 9027 and 9029, of the Revised Codes of 1905. In *Fisher v. Clark*, 41 Barb. 329, the court says: "The right of everyone to use his own property as he pleases for all the purposes to which such property is usually applied is unlimited and unqualified up to the point where the . . . use becomes a nuisance." In this case cited, the court states the facts as follows: "The parties were farmers, occupying adjoining farms. Each had a flock of sheep; those of the defendant had a contagious disease known as the scab, and the fact of the disease and its character were well known to the defendant. The defendant sent word to the plaintiff that he intended to turn this flock of diseased sheep in his own field next to the field of the plaintiff, where the sheep of the plaintiff were pasturing. The plaintiff thereupon called on him and told him he must not do it, insisting that he had no right so to do, and the result of the interview was that the defendant promised the plaintiff that he would not turn said diseased sheep into the lot next to the plaintiff. Disregarding this agreement, and without notice or the knowledge of the plaintiff, the defendant did turn his sheep into a lot adjoining where the plaintiff's sheep were, and only separated by a common rail fence. The division fence belonged to the plaintiff to repair, and was a good fence. The sheep of the defendant got into the plaintiff's field and mingled with his sheep, no evidence to show how or by whose fault. They were in several times; once the plaintiff found a rail shoved aside where they might have passed, but he had no knowledge that they did. At the other times it does not appear that there was any defect in the fence, or how they got in. The defendant also had, with his flock of diseased sheep, some lambs so small that an ordinary or common rail fence would not stop them, and they were frequently in the plaintiff's field with his sheep. That the disease was a contagious one which would be communicated either by the mingling of the sheep, or by running side by side separated only by a common rail fence, appeared fully by the evidence. The plaintiff's sheep became diseased and largely damaged."

The defendant set up in his answer that the plaintiff was guilty of contributory negligence in not keeping his fence in repair. The court, however, determined the case entirely upon the broad principle "that every man has absolute right to use his own property as he pleases, for all purposes to which such property is usually applied," and disregard-

ed entirely the question of contributory negligence of the plaintiff, and also the promise of the defendant not to put the sheep in the lot. At the present day it may well be doubted whether a court would disregard the promise which the defendant made the plaintiff in this case, independent of the fact that we have our statutes with reference to contagious diseases in animals. But in the case cited there was no claim that the plaintiff was entitled to recover under the provisions of any statute,—he was trying to recover under the general doctrine of the duty which one man owed to another.

In *Giles v. Walker*, L. R. 24 Q. B. Div. 656, "the defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities into the adjoining land of the plaintiff, where they took root and did damage." The plaintiff claimed that the defendant was negligent in his duty toward him, and sought to recover damages for failure to prevent these thistles from going to seed. Lord Chief Justice Coleridge says: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. The appeal must be allowed."

Appellant cites *State v. Dawson*, 38 Ind. App. 483, 78 N. E. 352. Here the defendant was prosecuted for violating the following statute: "Any person who shall knowingly allow Canada thistle or thistles to grow and mature, or shall allow any Canada thistle or thistles to grow until they or any of them become of the length of 6 inches, measured from the surface of the soil to the end or tip of the stem above the surface of the ground, upon his, her, or their land, or upon any land which they shall occupy or have under their charge and control . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc." It will be noticed that there is a vast difference between this statute of Indiana and the statute upon which the appellant relies. The Indiana statute makes it a criminal offense to permit

the growth of the Canada thistle in violation of the provisions of the statute, and prescribes penalty therefor, but the duty claimed by the appellant under our statute is not such for the violation of which any penalty has been attached, nor does the statute in any way make it a misdemeanor. It is true that § 5366 of our Code says: "That is not lawful which is (1) contrary to an express provision of law," etc. Is the failure of the defendant to destroy the wild mustard as charged in the complaint an unlawful act? Section 2086 says: "Each person shall destroy upon all lands which he shall own or occupy, all weeds of the kind known as . . . mustard . . . at such time and in such manner as shall effectually prevent their bearing seed." Upon whom rests the responsibility of prescribing the time and manner of such destruction? Subsequently, in the same section, the statute says: "The time and manner of destroying such weeds shall be prescribed by the board of county commissioners," etc. Is this duty, placed upon the county commissioners, the foundation for the action of the road supervisor only, as prescribed in § 2088, or is it the general provision which must be complied with before liability attaches to anyone, in any way affected by the requirements of this statute? It would appear from a correct reading of § 2088 that this section contemplates that the board of county commissioners shall fix the time and the manner of destruction for everyone who has the duty of destroying weeds, and, where the owner or occupier of the land fails to destroy within the time and according to the manner prescribed, then the duty of the road supervisor begins. In other words, while the law requires each person to destroy upon all lands which he shall own or occupy all wild mustard, at such time and in such manner as shall effectually prevent the bearing of seed, it does not contemplate that the man shall be a law unto himself, but places upon the county commissioners the duty of prescribing the time and manner of destruction, in order to have a uniformity in time and method, prescribed by those who presumably would be removed from any selfish desire to save time and money and labor. Therefore, no duty devolves upon anyone to destroy these noxious weeds until the board of county commissioners prescribes the time and manner of destruction. It being conceded that such action was never taken by the board, then no duty devolved upon the defendant, and in such a case his failure to destroy the weeds would not be

an unlawful act or omission according to the definition of "unlawful" set forth in § 5366.

Counsel for the appellant urges with great force and earnestness that, on account of the peculiar conditions in this state, "where the general sources of wealth are the crops that are yearly gleaned from the soil, and where the frugal and careful husbandman is the greatest asset to a community;" and, further, that it is not difficult to understand why the legislature should enact a law for the purpose of prohibiting the individual from damaging his neighbor's crops or lands as a result of his own indolence, or negligence; or that they should say to him in substance, you shall so farm your land as not to injure the crops or land of your neighbor, and if you do so injure them, you shall answer in damages. This would have force if such were the purpose of the legislature, but is such failure, as alleged, negligence? There is no negligence where there is no violation of a legal duty, and where there is no duty the "other" has no such right as is contemplated by the maxim quoted.

To give to this statute the interpretation which the appellant claims, would open a vast field of litigation, destroy the peace and harmony of communities, and set "every man's hand against his neighbor." The construction that will best promote the general welfare is to be preferred. *Stern v. Fargo*, 18 N. D. 289, 301, 26 L.R.A.(N.S.) 665, 122 N. W. 403. If the legislature intended to make one liable in such a case as this, it would have been an easy matter to express such an intention in plain, unequivocal language. There is a vast difference between injuries which result in cases where a man brings upon his own land great quantities of anything which, if it escaped from his land, would injure his neighbor, and a case where, under the law of nature, noxious weeds grow upon a man's land in spite of his wish, desire, and effort. So far as we can ascertain, this question has not been raised in our courts, and apparently the idea that a man is not liable under the state of facts in this case has been acquiesced in generally. It is true that the mere acquiescence in such an idea, and the mere assumption on the part of either the bench or the bar, or the public in general, that a statute has a certain meaning, does not make it the law, but, as is said in *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110, "a construction which has for a third of a century been

accepted by everyone as so obviously correct as never to have been questioned or doubted is much more likely to be right, than a newly discovered one, suggested at this late day by the emergencies of present litigation."

Where the public in general has taken for granted that a certain construction of the law is the law, and where a change in construction as contemplated would be fraught with grave consequences, this court would hesitate to place a new construction upon the law, unless it was clear that the construction desired is the only logical one which the law will bear. But, independent of this, it is clear to our mind that there is no duty resting upon the owner or occupier of the land until the proper authorities have prescribed the time and manner of destruction.

The question as to whether a man would be liable in damages for failure to perform a duty even in case where the board of county commissioners prescribed the time and manner of destruction, as required by law, is not before us now, and need not be considered here.

For the reasons given, we believe that the demurrer was properly sustained, and the judgment of the lower court is therefore affirmed.

HON. A. G. BURR, Judge of the Ninth Judicial District, sitting at the request of the court.

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STATE OF NORTH DAKOTA EX REL. AUGUST BERNDT  
v. CHARLES F. TEMPLETON, as Judge of the District Court  
of the First Judicial District, State of North Dakota.

(130 N. W. 1009.)

**Practice — New Trial — Newly Discovered Evidence.**

Section 7229, Rev. Codes 1905, which prescribes the procedure both in the district and supreme courts in certain actions triable to the court without a jury, does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence.

Opinion filed April 24, 1911.

Mandamus by the State, on the relation of August Berndt, against Charles F. Templeton, Judge of the District Court of the First Judicial District.

Writ allowed.

*Guy C. H. Corliss*, for appellant.

*Henry G. Middaugh*, for respondent.

FISK, J. This is an application for a writ of mandamus to compel defendant to exercise jurisdiction to hear and determine a motion for a new trial upon the ground of newly discovered evidence in a certain action pending in the district court, and which was tried and decided by the court under the so-called Newman law, being § 7229, Rev. Codes 1905.

The sole question for determination on this application is the power of the district court to entertain such motion. That such power exists, is, we think, entirely clear. Both by statute and precedents, such power is authorized. Section 7063, Rev. Codes, provides: "The former verdict *or other decision may* be vacated and a new trial granted . . . for any of the following causes: . . . 4. Newly discovered evidence . . ." The words above italicized disclose that the legislative intent to authorize such motions in court cases is apparent, for otherwise such words would have no meaning in the statute. Such is also the general rule in states where the distinction between law and equity actions is abolished. 29 Cyc. Law & Proc. p. 723, and cases cited in note 21. See also *Law v. Smith*, 34 Utah, 394, 98 Pac. 300.

But counsel for defendant relies on two decisions by this court as announcing the contrary rule of practice. Such decisions are *Pratt v. Beiseker*, 17 N. D. 243, 115 N. W. 835, and *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860. Before noticing these cases it is well to briefly refer to § 7229. This statute was first enacted in 1897, and governs the practice both in the trial and appellate courts in certain actions tried to the court without a jury. By this statute it is expressly provided that "no new trial shall be granted by the district court on the ground that incompetent or irrelevant evidence has been received, or on the ground of the insufficiency of the evidence." It will thus be readily observed that it could not have been the intent to abolish by this statute any grounds for granting new trials, except

those specially mentioned. This seems too clear for debate. It is equally clear that the sole object which the legislature had in view in thus depriving the district courts of the power to grant new trials on the above specified grounds was merely because such modification of the prior practice was essential to effectuate the harmonious working of this new statute, which provides for trials anew on appeals to the supreme court. In view of the provisions of such statute, requiring all evidence offered to be received, and requiring trials *de novo* in this court on appeal, there no longer remains any reason for permitting the granting of new trials in the district court on account of errors in admitting or excluding testimony, or on account of the insufficiency of the evidence. As to such matters the statute makes provision for a new trial or trial anew in the supreme court. *McKenzie v. Bismark Water Co.* 6 N. D. 361, 71 N. W. 608. But this is not true as to newly discovered evidence. While the case is tried anew in this court, it must be determined on the record made in the lower court. Newly discovered evidence, although absolutely conclusive of the merits, can be introduced only in the trial court, and it, of course, cannot be introduced there, except where a new trial is had. It logically follows, if defendant's contention be sound, that there is no way in which such new evidence may be made available to the party discovering it. Such a condition might often result in a miscarriage of justice. But how stands the prior decisions of this court on this important practice question? The case of *McKenzie v. Bismark Water Co.* *supra*, certainly does not support defendant's contention. On the contrary, by strong implication it holds to the contrary. We quote from the opinion as follows: "Moreover, if we turn to § 5630, Rev. Codes [7229, Rev. Codes 1905], it becomes transparently clear that upon the ground of errors in law—i. e., 'rulings,' etc., occurring at the trial—a motion for a new trial will not lie in the district court. For such errors a trial anew could be had in this court, under the section above quoted, and which must govern this case." Such language is wholly inconsistent with the theory that a new trial may not be granted by the district court on any ground. Why did the court in that case, and why did the legislature in enacting § 7229, go to the trouble of specifying the instances in which a new trial may not be granted, if a new trial may not be granted at all? Nor is the case of *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860, an authority in defendant's



favor. There, the court (whether correctly or erroneously is immaterial) held, following certain prior decisions, that where, in a case tried to a jury, both parties move, at the close of the trial, for a directed verdict, it becomes a court case, and must be governed on appeal by § 7229. After reaching such conclusion the court very properly held that "no motion for a new trial is provided for in the trial court, nor in this court, so far as granted on errors assigned."

The question here presented was not involved on that appeal.

In *Pratt v. Beiseker*, 17 N. D. 243, 115 N. W. 835, relied on by counsel for defendant, this court held that the proceedings on the motion for a new trial were improperly before either the supreme or district courts. Such holding was clearly correct. The reason for such decision is not there stated, but an examination of the record in that case discloses that the motion for a new trial was not made in the district court until after the appeal from the judgment, in which a trial *de novo* in this court was demanded, had been duly taken and perfected, and, of course, such appeal deprived the district court of jurisdiction to thereafter entertain the motion for a new trial. Respondent's counsel in that case nowhere contended that the trial court could not entertain a motion for a new trial if made in time.

We have no hesitancy in holding that the district court has the power to entertain motions for new trials upon the ground of newly discovered evidence.

The writ will issue as prayed for by relator.

All concur, except MORGAN, Ch. J., not participating.

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THE STATE OF NORTH DAKOTA EX REL. A. R. WATKINS.  
v. P. D. NORTON, as Secretary of State of the State of North  
Dakota.

(131 N. W. 257.)

**Constitutional Law — Legislature — Time for Executive to Act on Bills —  
Sundays Excepted.**

Section 79, Constitution of North Dakota, among other things provides:

"If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law."

unless the legislative assembly, by its adjournment, prevent its return, in which case it shall be a law unless he shall file the same with his objections, in the office of the secretary of state, within fifteen days after such adjournment."

*Held*, construing said constitutional provision, that in computing the fifteen days' period in which the governor may exercise the veto power after the adjournment of the legislative assembly, Sundays are not excepted, consequently the attempted veto of house bill No. 410, relating to abstractors of titles passed by the twelfth legislative assembly on March 3d, became a law on March 18th. and the attempted exercise by the governor of his veto power as to such bill on March 21st is of no force or effect.

Opinion filed May 9, 1911.

Mandamus by the State, on the relation of A. R. Watkins, against P. D. Norton, Secretary of State.

Writ allowed.

*Engerud, Holt, & Frame*, for plaintiff.

*Andrew Miller*, Attorney General, and *C. L. Young*, Assistant Attorney General, for defendant.

FISK, J. On the application of relator an alternative writ of mandamus was issued on April 28th, returnable on May 4th, commanding the defendant, as secretary of state, to cause to be published, as required by law, house bill No. 410, which act was passed by the twelfth legislative assembly on March 3d last, or show cause why he has not done so. On the return day defendant appeared and urged as a reason why he should not be required to publish said act, that the same was duly and regularly vetoed by the governor.

The act in question is entitled as follows:

"A Bill for an Act to Amend §§ 2231-2232-2233-2234 of the Revised Codes of 1905 Relative to Abstractors of Titles."

The undisputed facts are that the twelfth legislative assembly adjourned *sine die* on March 3d, on which date such bill was duly transmitted to the governor for his approval or disapproval, and the governor took no action thereon until March 21st, on which date he assumed to exercise the veto power as to such bill by disapproving the same and returning it, with his disapproval, to the secretary of state. Between March 3d and March 21st there were three intervening Sundays, and the sole question for our determination is whether, in computing the fifteen days' period provided in § 79 of the Constitution

of this state in which the governor may approve or disapprove bills after the adjournment of the legislative assembly, these intervening Sundays shall be included or excluded. Section 79, in so far as the same is applicable, reads as follows: "If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislative assembly, by its adjournment, prevent its return, in which case it shall be a law unless he shall file the same with his objections, in the office of the secretary of state, within fifteen days after such adjournment."

It is contended by defendant that the qualifying words, "Sundays excepted," which immediately follow and qualify the words, "within three days," as used in the first part of said sentence, also relate to and should be held to qualify the words, "within fifteen days," as used in the latter part of such sentence. We deem it entirely clear that such construction is unwarranted. Had the same period of time been fixed in both instances, the construction contended for, no doubt, would be sustained, as was held in the following cases: *People ex rel. Akin v. Rose*, 167 Ill. 147, 47 N. E. 547; *Capito v. Topping*, 65 W. Va. 587, 22 L.R.A.(N.S.) 1089, 64 S. E. 845; *Stinson v. Smith*, 8 Minn. 366, Gil. 326; *State ex rel. State Pharmaceutical Asso. v. Michel*, 52 La. Ann. 936, 49 L.R.A. 218, 78 Am. St. Rep. 364, 27 So. 565.

But a careful examination of the above authorities serves to convince us that they are not in point in the case at bar. It will be noticed that in each of those cases the governor was allowed the same period of time after the adjournment of the legislature that was allowed him before such adjournment in which to act on bills, and this was a controlling fact in the decisions of those cases. The reasoning in the opinions in the above cases does not apply in construing the language of our Constitution, above quoted. The fact that the framers of our Constitution deemed it wise to exclude intervening Sundays in fixing the three days' period in no manner tends to show that, in fixing the fifteen days' period, they deemed it wise or necessary to also exclude intervening Sundays. They were dealing with two distinct periods of time, having no similarity; and if they intended to exclude intervening Sundays as to the larger period of time fixed by them, it is reasonable to assume that they would have expressly so provided.

While perhaps not controlling, it is a significant fact, entitled to

some weight, that the executive department ever since statehood and until the instant case, has apparently uniformly adopted a construction of such constitutional provision in harmony with our views above expressed.

Peremptory writ will issue as prayed for.

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**WILLIAM G. SCHAFER v. THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT WITHIN AND FOR NELSON COUNTY, NORTH DAKOTA, Charles F. Templeton, as Judge of Said District, and R. J. Roberts, as Clerk of Said District Court.**

(131 N. W. 240.)

**Certiorari — When Lies.**

1. Certiorari does not lie when there is an appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

**Appeal and Error — Supreme Court — Stay of Execution.**

2. After this court has acquired jurisdiction of a cause by appeal, it has inherent power, on proper application, to enter any appropriate order therein, including the power to vacate a stay of execution pending the determination of such appeal ordered by the trial court upon an inappropriate or insufficient undertaking, unless appellant furnishes the necessary undertaking to secure the stay of execution granted.

Opinion filed May 11, 1911.

Petition of William G. Schafer for writ of certiorari to the District Court of Nelson County, First Judicial District; *Charles F. Templeton*, Judge, and R. J. Roberts, Clerk.

Motion to quash writ granted.

*Hiram A. Libby*, for motion.

*Fuch & Kelly*, opposed.

SPALDING, J. On the 6th day of April, 1911, on the affidavit of George D. Kelly, attorney for the plaintiff, in an action entitled, "Wil-

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Note.—Exceptions to the rule that certiorari will not lie where there is an appeal, see note in 50 L.R.A. 787.

When writ of certiorari issues, see note in 12 Am. Dec. 531.

liam G. Schafer, Plaintiff, v. Pontus Olson and Clinton D. Lord, Defendants," this court issued its writ commanding the judge and clerk of the district court of Nelson county to certify and send to this court a transcript of the record and proceedings touching the granting of a stay of execution therein, that the same might be reviewed by this court. On the 17th day of April the parties appeared and the defendants submitted a motion to quash the writ, on the ground that certiorari is not the proper remedy, but that an appeal lies from the order of the district court fixing the amount of the undertaking on appeal and its approval of the latter. Return was also made as commanded by the writ.

1. Certiorari does not lie when there is an appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. Rev. Codes, 1905, § 7810; St. Paul, M. & M. R. Co. v. Blakemore, 17 N. D. 67, 114 N. W. 730.

2. It is unnecessary to determine whether an appeal lies from an order of the district court fixing the amount of an undertaking on appeal and staying execution pending the determination of the appeal. We are inclined to think, on the authority of St. Paul, M. & M. R. Co. v. Blakemore, *supra*, that it is appealable. We are, however, convinced that the applicant has another and speedier remedy, one far more speedy than the remedy by appeal, even if the order is appealable. The court in this case gave personal judgment against the defendant Olson in favor of the plaintiff for a definite amount, and then adjudged that the plaintiff had a vendor's lien on certain described real estate as security therefor, and directed the sale thereof and the execution and delivery of a certificate of sale, and deed if not redeemed in one year, the decree being practically in the form frequently used in actions to foreclose mortgages. The court fixed the amount and terms of the undertaking on the appeal in accordance with the terms of §§ 7212 and 7215, Rev. Codes 1905, in the sum of \$1,000, while the applicant claims that it should have been fixed according to the requirements of § 7209, Rev. Codes 1905, applicable to money judgments, and that the trial court erred in so fixing the amount of the undertaking and in staying execution on the judgment. The necessary undertaking for costs on appeal was furnished, and the case is in this court. Being here, this court has the power, on proper application, to enter any appropriate order. This power is inherent in the court. It follows

that if the undertaking furnished and approved was insufficient in law to stay execution of any part of the judgment, the applicant has a remedy, through an application to this court, to vacate so much of the stay granted by the trial court as was not justified, unless the appellant furnishes the undertaking necessary to support a complete stay of execution. Elliott, Appellate Procedure, §§ 366, 367, 399, and 400; American Brewing Co. v. Talbot, 135 Mo. 170, 36 S. W. 657; Hill v. Finnigan, 54 Cal. 493; Edgerton v. West, 38 Fla. 338, 21 So. 278; Tulleys v. Keller, 42 Neb. 789, 60 N. W. 1015, 2 Cyc. Law & Proc. pp. 904-907. This right disposes of his application for the writ of certiorari and the motion to quash the same.

The motion to quash is granted. All concur.

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**J. I. CASE THRESHING MACHINE COMPANY, a Corporation,  
v. OSCAR N. E. ERICKSON and Elna Erickson.**

(131 N. W. 269.)

**Sales — Exclusion of Implied Warranty — Fraud — Evidence.**

Action to foreclose a chattel mortgage given to secure the payment of certain promissory notes representing the purchase price of a second-hand threshing engine, separator, and other attachments, and also certain new machinery. The defense interposed is that of fraud and false representations on the part of the plaintiff's agent in soliciting the order for such machinery, also breach of warranty; and defendants seek to recover, by way of counterclaim, damages as a result of such alleged false representations and breach of warranty in attempting to operate said machinery, and also for freight paid by them thereon.

The written order for the second-hand machinery, which was signed by defendants, contains the following express stipulations: "It is fully understood and agreed that said machinery is purchased as second-hand, and is not warranted." Also, "No representation made by any person as an inducement to give and execute this order shall bind the company."

The evidence relating to the defense and counterclaim is conflicting.

*Held*, for reasons stated in the opinion, that the findings and conclusions of the trial court in plaintiff's favor should not be disturbed.

Opinion filed May 18, 1911.

Appeal from District Court, Burleigh county, *W. H. Winchester, J.* Action in foreclosure. From a judgment in plaintiff's favor, defendants appeal.

Affirmed.

*T. R. Mockler*, for appellants.

Parol evidence is admissible to show fraud as the inducement to a written contract. *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Gross v. Drager*, 66 Wis. 150, 28 N. W. 141; 14 Am. & Eng. Enc. Law, pp. 199, 200, and cases cited; *Aultman & T. Co. v. Finck*, 36 Neb. 680, 54 N. W. 989; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710; *Story v. Gammell*, 68 Neb. 709, 94 N. W. 982; *Woodbridge Bros. v. DeWitt*, 51 Neb. 98, 70 N. W. 506.

Defendants should have recovered on their counterclaim, for damages based on fraud. *Van Wilkle v. Wilkins*, 81 Ga. 93, 12 Am. St. Rep. 300, 7 S. E. 644, 20 Cyc. Law & Proc. p. 136, and cases cited; 8 Am. & Eng. Enc. Law, p. 819; *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 896; *Moberly v. Alexander*, 19 Iowa, 162; *Massachusetts Loan & T. Co. v. Welch*, 47 Minn. 183, 49 N. W. 740; *Johnson v. St. Louis Butchers' Supply Co.* 60 Ark. 387, 30 S. W. 429.

Principal is liable for fraud, deceits, misrepresentations and omissions of his agent, although he did not participate in, know of, or sanction the misconduct. *Fifth Avenue Bank v. Forty-second Street & G. Street Ferry Co.* 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68.

Discharge of principal is discharge of surety. *Ames v. Maclay*, 14 Iowa, 281.

*H. R. Turner* and *M. W. Murphy*, for respondent.

Offer of rescission must be made promptly and consideration returned or tendered. *Lovell v. McCaughey*, 8 S. D. 471, 66 N. W. 1085; *Fahy v. Esterley Mach. Co.* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145.

Proof of fraud must be clear and convincing. *Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889; *Heyrock v. Surerus*, 9 N. D. 28, 81 N. W. 36.

Misrepresentation must relate to material matter constituting the inducement to contract, of which the injured party had no means of

knowledge, and upon which he relied to his injury. *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Smith v. Richards*, 13 Pet. 26, 10 L. ed. 42; *Powell v. Adams*, 98 Mo. 598, 12 S. W. 295.

Equity will not relieve from inattention and carelessness in relying upon the representation of another instead of his own judgment, when the means of information are alike to both parties. *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610; *Walsh v. Hall*, 66 N. C. 233; *Anderson v. Rainey*, 100 N. C. 328, 5 S. E. 182; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166.

Must elect promptly to acquiesce or repudiate. *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549.

Where no artifice is used to prevent reading, one is bound by what he signs. N. D. Rev. Codes 1908, §§ 5333-5343; *Alsterberg v. Bennett*, 14 N. D. 596, 106 N. W. 49; *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911; *Schmitz v. Hawkeye Gold Min. Co.* 8 S. D. 544, 67 N. W. 618.

**FISK, J.** This is an appeal from a judgment of the district court of Burleigh county, and comes here for trial *de novo*.

The action was brought to foreclose a chattel mortgage executed and delivered by defendants to plaintiff on April 4, 1906, to secure the payment of the sum of \$1,998.75, according to the terms of four promissory notes also executed and delivered at the date of such mortgage by defendants to plaintiff, and representing the purchase price of a certain separator, engine, stacker, weigher, and other attachments; also a new steel tank and plowing attachment.

The complaint is in the usual form, no question as to its sufficiency being raised. The answer contains a qualified general denial, but admits the execution and delivery of the notes and mortgage, as alleged in the complaint. The answer then alleges the purchase of such property by the defendant Elna Erickson, giving her notes as aforesaid in payment for such machinery, and that her codefendant executed such notes merely as surety. Such answer then alleges that Elna Erickson was of Swedish nationality, and unfamiliar with the English language, and that she was induced to purchase such machinery and execute the notes and mortgage aforesaid upon the false and fraudulent representation of plaintiff's agent that the engine and separator had been used



but a short time, when, in truth and in fact, such agent well knew that the same had been used six years. She also alleges that said machinery was warranted to do good work and to be in first-class condition, but that in truth and in fact it was practically worthless, such engine and separator not exceeding in value the sum of three or four hundred dollars, and that she would not have executed such notes and mortgage had she known of the falsity of such representations. Such answer also contains a counterclaim for damages suffered by her on account of such false representations and for money paid out as freight on such property to her damage in the sum of \$4,000.

To such counterclaim a reply consisting of a general denial was interposed.

The issues thus framed were tried in the district court without a jury, and at the conclusion of the trial, that court made its findings of fact and conclusions of law in all things favorable to the plaintiff, and judgment was entered pursuant thereto.

The testimony is quite voluminous, and we shall not attempt in this opinion to review the same in detail. Suffice it to say that, after a careful consideration of the entire record before us, we are agreed that the findings and conclusions of the trial court are in the main correct, and should not be disturbed.

It clearly appears that the sole authority of the agent with whom defendants had their negotiations at the time they signed the orders for the machinery was that merely of soliciting orders on plaintiff's blanks and forwarding the same to plaintiff for approval. The engine, separator, and attachments were second-hand machinery, and ordered and sold as such, and in the order for this machinery there is an express stipulation as follows: "As a condition thereof it is fully understood and agreed that said machinery is purchased as second-hand, and is not warranted." It is also therein stipulated that "no representation made by any person as an inducement to give and execute this order shall bind the company." And also, "Acceptance by purchaser is a full waiver of all claims arising from any cause." Defendants voluntarily signed said order and must, as against the plaintiff, be deemed to have knowledge of the foregoing stipulation. On a separate blank, defendants at the same time ordered from plaintiff certain new machinery, and such order contains a warranty, but no claim is made that such new machinery did not fully comply with the warranty. Pri-

or to the time defendants executed and delivered the notes and mortgage described in the complaint, they had a full opportunity to examine the machinery, and we think the testimony fairly discloses that they, in fact, did so. Thereafter the same was unloaded and removed to defendant's farm, where it was used off and on for about a year. The engine and separator proved to be somewhat of a disappointment to defendants, and they had considerable trouble in operating the same, but no offer or attempt was ever made by them to rescind the contract. But sometime after the engine had been tried they caused a letter to be written to the plaintiff, in which, among other things, it was stated, "The engine is not as good as the description you gave of it. It has been used more than sixty days. We will keep it if you will sell it cheaper." But so far as the record discloses the plaintiff company took no notice of such letter. The purchase price of the second-hand outfit, as appears from the order, was \$1,651.75, and defendants admit that they sold the engine to Reeves & Company for \$1,315. In the light of this admission defendants' contention, under their counterclaim, does not appeal to us with favor. They still retain the other machinery, and after using it all, including the engine, during one season, they are in a court of equity praying for large damages on account of alleged misrepresentations of plaintiff's agent. The testimony regarding the fraud complained of is conflicting, and in no manner conclusive in defendants' favor. Fraud is never presumed, and the burden to establish the same is upon the party alleging it. The trial court saw and heard the witnesses give their testimony, and that court is in a better position than this court to determine both the credibility of the witnesses and the weight of their testimony; and, while in cases of this kind the findings of the trial court are in no manner binding on this court, we are agreed, in the light of all the facts disclosed by the record, that the conclusions of that court are just and equitable, and the judgment is accordingly affirmed.

MORGAN, Ch. J., not participating.

FULBINA ADAM, Otherwise Known as Phillipina Adam, and Nikolaus Adam, Her Husband, v. W. D. McCLINTOCK, D. D. Jenkins, Merchants Bank of Rugby, North Dakota, a Corporation.

(131 N. W. 394.)

**Public Lands — Property Subject to Mortgages — Homestead — Mortgage of Unperfected Entry — Bankruptcy.**

1. Plaintiff, an unmarried woman, executed a mortgage on land held by her under homestead entry, on which homestead she was residing; the mortgage immediately recorded secured the payment to defendants of her father's debt. She thereafter married her coplaintiff herein; they resided together on the land, and claimed the same as exempt as a homestead under the state laws; the wife mortgagor files her schedules in bankruptcy, in which she lists the debt, mortgage, and all covenants therein, of which defendants had notice; said proceedings were regular and resulted in plaintiff's discharge in bankruptcy of all provable debts so dischargeable; in such proceedings she claimed her homestead as exempt under the state homestead laws, and the same was set apart to her as such. After such discharge, she makes final proof on her homestead, based on five years' residence, cultivation, and improvement, on which proof, patent was delivered to her for the land so homesteaded. She, with her husband, then instituted this action, asking that the mortgage be adjudged invalid, alleging its invalidity, that the homestead exemption defeated the mortgage, and that the discharge in bankruptcy discharged the debt and mortgage. *Held*, that the mortgage is a valid lien on the land, and foreclosure ordered.

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Note.—It is very generally held that the sections of the homestead laws providing that the land shall not be liable for debts incurred prior to the issuance of a patent are for the benefit of the homesteader, and that the law does not prevent a voluntary subjection of the land as security for debts created prior to the patent. And the decision in *ADAM v. McCLINTOCK*, sustaining the validity of a mortgage upon public lands, executed by a claimant under the homestead acts, although made prior to patent or final proof, is in harmony with the weight of authority, as shown by a note in 6 L.R.A.(N.S.) 934, and a note in 52 Am. St. Rep. 252. The cases, however, are not entirely harmonious as to the time when the mortgage may be executed, some holding that a mortgage given by the homesteader after he has done everything necessary to entitle him to a patent is valid, although the patent has not yet been issued, but that a mortgage executed prior to the patent is void; while others hold that a mortgage made by a homesteader, even prior to his right to file final proof, is valid.

**Public Lands — Homestead — Mortgage of Unperfected Entry — After-acquired Title.**

2. Under § 6155 of the North Dakota Revised Codes of 1905, the title, after acquired by patent to the homesteader, inures to the mortgagee as of the date of the execution and delivery of the mortgage.

**Public Lands — Mortgage of Government Homestead — Estoppel.**

3. The mortgagor, by reason of the covenants and recitals contained in the mortgage, is estopped to deny its validity.

**Public Lands — Recording Transfers — Notice.**

4. The recording of a mortgage in the office of the register of deeds of the county in which the land is situated, prior to final proof on the land so mortgaged, operates as constructive notice to the same effect as though the mortgage had been executed and recorded after the recording of the patent.

**Homestead Exemption — After-acquired Title — Mortgage.**

5. The homestead exemption to the family is dependent upon the mortgagor's title, and that is subject to the prior-acquired lien of the mortgage, and the mortgage is not affected by the homestead exemption.

**Bankruptcy — Effect on Mortgage Lien.**

6. As plaintiff, mortgagor, had resided six and one-half years on the tract, prior to the institution of bankruptcy proceedings, she had the full, vested, equitable title to the land homesteaded, to which the mortgage attached before bankruptcy.

**Bankruptcy — Mortgage on Homestead — Effect.**

7. The bankruptcy proceedings in no wise affected the lien of the mortgage.

Opinion filed March 10, 1911. Rehearing denied May 5, 1911.

'Appeal from District Court, Pierce county, *Burr*, Judge.

Suit by Fulbina Adam and another against W. D. McClintock and others, to quiet title to certain land as against a mortgage held by defendants. From a judgment for plaintiffs, defendants appeal.

Reversed.

*Paul Campbell*, for appellants.

Mortgage on public domain is good when title becomes perfected in the entryman. *Rogers v. Minneapolis Mach. Co.* 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; *Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121; 27 Cyc. 1038; *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486; *Yerkes v. Hadley*, 5 Dak. 324, 2 L.R.A. 363, 40 N. W. 340, 24 Am. & Eng. Enc. Law, 2d ed. 234, 235; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; 24 Am. & Eng. Enc. Law, 2d ed 406, 407, 411-413; 32 Cyc. 1075, 1084.

Bankruptcy does not affect a lien by mortgage or otherwise. *Loveland*, Bankr. 822, 823; 27 Cyc. 1405; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; *Paxton v. Scott*, 66 Neb. 385, 92 N. W. 611; 5 Cyc. 364-366.

Where entryman has earned patent by residence and cultivation, although final proof was not made, the lien attached, and was not affected by bankruptcy proceedings. *Dale v. Griffith*, 93 Miss. 573, 136 Am. St. Rep. 546, 46 So. 543; 27 Cyc. 1034, 1036-1038, 1040, 1139, 1168; 32 Cyc. 1066-1068, 1070-1076.

*Butler Lamb*, for respondent.

Bankruptcy discharge exempts a mortgagor from having his mortgage attach to after-acquired land. *Fleitas v. Richardson*, 147 U. S. 550, 37 L. ed. 276, 13 Sup. Ct. Rep. 495; 5 Cyc. 398; *Wolf v. Stix*, 99 U. S. 8, 25 L. ed. 313; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 314; *Carey v. Mayer*, 25 C. C. A. 239, 51 U. S. App. 190, 79 Fed. 929; *Heywood v. Shreve*, 44 N. J. L. 101, 102; *Cobb v. Overman*, 54 L.R.A. 369, 48 C. C. A. 223, 109 Fed. 65.

Covenants in a mortgage on public domain do not run with the land until final proof perfects title. *Re West*, 128 Fed. 205; *Re Home Discount Co.* 147 Fed. 538; *Leitch v. Northern P. R. Co.* 95 Minn. 35, 103 N. W. 704, 5 A. & E. Ann. Cas. 63.

To inure to mortgagee, after-acquired title must be obtained in same capacity as when mortgaged. *Dye v. Cook*, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631; *Woodward v. People's Nat. Bank*, 2 Colo. App. 369, 31 Pac. 184; *Dewhurst v. Wright*, 29 Fla. 233, 10 So. 682.

Estoppel cannot work against one spouse, if the other does not sign mortgage. 9 A. & E. Ann. Cas. 14; *Chopin v. Runte*, 75 Wis. 361, 44 N. W. 258; *France v. Bell*, 52 Neb. 57, 71 N. W. 984.

Goss, J. This action comes to this court upon an appeal by defendants from a judgment entered against them in favor of the plaintiffs by the district court of Pierce county; the judgment as entered quieted title in plaintiffs to the land involved. From this judgment, defendants appeal.

On trial the facts were stipulated, and are summarized into the following statement: Fulbina Adam, before her marriage, made homestead entry upon 160 acres of land in Pierce county, in 1901, establishing her residence thereon soon afterwards. On November 7, 1902,

to secure her father's pre-existing debts to the defendants, evidenced by promissory notes aggregating \$280, and accrued interest due in 1903, plaintiff executed and delivered to defendants her mortgage in writing, duly acknowledged by her, covering her unproved government homestead, and running to defendants as mortgagees. The mortgage contained the usual covenants of title, ownership, right of possession, quiet enjoyment, right to convey, and against encumbrances. It also covenanted to pay the debts purported to be so secured. This mortgage was recorded in the office of the register of deeds on the day it was given. Plaintiff, Fulbina Adam, did not sign the notes secured by the mortgage, and the debts evidenced by said notes were not her debts. The mortgage was executed in her maiden name, Fulbina Baumstark. Her father, since deceased, had previously executed the notes secured, and he joined in the mortgage, which covered other lands in which he had some interest. Thereafter, in August, 1903, these plaintiffs intermarried, and ever since have been and now are husband and wife. Immediately on their marriage, they moved upon the unproven homestead held under homestead entry of the wife, and have even since resided thereon. The husband plaintiff, since the marriage, has placed improvements upon the wife's homestead to the value of \$500, and has had the complete control, charge, and use of said premises. Since their marriage three children have been born to plaintiffs, and the tract has always been claimed as exempt under the state homestead law, from levy under execution, and is of a value of less than \$5,000. That, at the time Fulbina Baumstark executed and delivered the mortgage aforesaid, Nikolaus Adam was not present. He had no notice of the existence of said mortgage until after final proof had been made on said land, and he is in no way liable for the indebtedness mentioned in the mortgage.

On June 29, 1908, Fulbina Adam filed her duly verified schedules in bankruptcy in the United States district court, and was then duly adjudged a bankrupt upon proper motion and order; that her schedules in bankruptcy listed and set forth the indebtedness and mortgage signed by her, heretofore mentioned, and in addition thereto she duly scheduled and listed all estoppels against her, contained in the warranties and covenants of said mortgage; that in said schedules she claimed as exempt to her the homestead premises, both under the homestead laws of the state of North Dakota and under the government homestead law, and that

said land was by the court set apart to her as homestead property and as exempt, as claimed in her schedules. It is further stipulated that said proceedings were in all things regularly conducted before said bankruptcy court, and as a result Fulbina Adam was duly adjudged a bankrupt under the laws of Congress relating to bankruptcy; that she conformed to all the requirements of the bankruptcy laws in that behalf, and was, on September 24, 1908, after due notice had been given, as by such laws required, to all parties entitled thereto, including the defendants herein, discharged from all debts and claims which are made provable by the United States bankruptcy acts against her estate, and which existed on June 29, 1908, the day the petition for adjudication in bankruptcy was filed by her; the decree in bankruptcy, however, excepted such debts from its operation as are excepted by law from discharge in bankruptcy.

It is further stipulated that on October 15, 1908, Fulbina Adam made final proof for said land under her homestead entry of seven years before, based on residence on such land,—not commutation proof,—and that her final proof was duly accepted by the Department of the Interior, and that title has passed on said final proof by patent from the United States to her, Fulbina Adam, prior to the commencement of this action. That said proof was paid for by her husband and coplaintiff, Nikolaus Adam, and that, at the date of said proof and long previous thereto, and at the time that title passed from the United States government for said land to Fulbina Adam and previous thereto, this plaintiff, Nikolaus Adam, claimed homestead rights in and to said land under the state laws, and was living thereon with his wife, Fulbina Adam, and had all such homestead rights as are so allowed by law.

The foregoing facts are the stipulated facts before the court. The pleadings are in the usual form, the husband and wife, plaintiffs, asking that title be quieted in them, to the effect that the mortgage be declared no lien upon the land, and be adjudged void and canceled of record. Defendants, answering, recite their mortgage, default in payment thereof, the usual statutory recitals, and ask judgment for sale of the land under foreclosure, to collect the debt so secured. The trial court made findings of fact establishing the facts stipulated, and ordering judgment thereon as prayed for by plaintiffs, declaring defendant's adverse claims under the mortgage to be void, discharged, and a mere cloud on the title to said land.

This case presents many interesting questions for decision, among them (1) the validity of the mortgage given on the unproven government homestead of the wife plaintiff prior to her marriage; (2) the effect, if any, of the adjudication and discharge in bankruptcy upon the mortgage; and (3) whether the husband's homestead exemption or rights thereunder in and to the land under our state laws affect any rights the mortgagees may have under the mortgage given by the wife before marriage. On the decision of these questions turns the case.

Under the statement of facts, the entrywoman, plaintiff, executed the mortgage in question the year following her homestead entry upon the land, October 22, 1901. When she filed her schedules in bankruptcy, and was adjudged a bankrupt on June 29, 1908, she had resided upon said land for over five years, in fact over six and one-half years, and thereafter, on October 15, 1908 she made final proof, and the same was accepted and a United States patent based on such residence and improvements was issued and delivered to her prior to the commencement of this action. She was an unmarried woman when she made homestead entry, and also at the time she mortgaged her homestead, the date of her marriage being August 15, 1903.

Was her mortgage valid when executed, considering the fact that legal title to the land was then in the United States government? The later authorities are unanimous that an entryman on government lands, holding the same under the homestead laws, may give a valid mortgage thereon, and that, regardless of the fact that legal title has not been conveyed by the government to the homesteader. Nor does the statute, U. S. Rev. Stat. § 2296, U. S. Comp. Stat. 1901, p. 1398, to the effect that no land so held shall in any event become liable to the satisfaction of any debt contracted before final proof, invalidate a mortgage voluntarily given on land so held.

An entryman acquires by homestead entry the right of possession, use, and occupancy of the land homesteaded, subject to the fulfilment by him of the Federal law requiring his residence upon, and cultivation and improvement of, the land so held. And upon his compliance with the law in such particulars for the period of five years from and after his homestead entry, the inchoate right to legal title becomes in fact a full equitable title to the land so homesteaded. Such equitable title, however, on final proof of his compliance with the homestead law, when made through the proper channels provided for by the Federal govern-



ment, is merged in the government patent to the land, which patent is issued upon the approval of the final proof, and as the last act necessary to be performed to transfer the legal title to the entryman. This act of executing and delivering the patent is held to be but a ministerial act. The foregoing describes the legal status of the homesteader's rights from the inception of his rights by homestead entry, until legal title is vested in him by the government patent to the land homesteaded.

At no stage of these proceedings, up until the homesteader has fully complied with the homestead act by residence upon, cultivation and improvement of, his homestead for the full period of five years, has he the full equitable title to the land homesteaded; but upon the expiration of such time, and upon such compliance with the law, he has the full equitable title to his homestead land, subject only to the defeasance by his death before final proof, or failure to make final proof, as provided by law. The act of final proof is not a part of the requirement of the Federal homestead statute, but is merely proof of the fact of his compliance with that statute. The government is informed of such compliance by such proof, and thereupon, as a purely ministerial act, issues its grant by patent to the homesteader. The full equitable title is in the homesteader as completely immediately after the five years' compliance with the law, and up to the time of final proof, as it is after the final act of making the proof and prior to the issuance of patent. From the date of homestead entry until the completion of the five years' requirement of residence, cultivation, and improvement, the inchoate right of the entryman is gradually being developed, until the same becomes in fact a vested equitable title at the end of such five-year period.

The following authorities, practically covering that portion of the United States where the public domain has been disposed of by virtue of the homestead law, expressly hold in accordance with the foregoing, that mortgages are valid given by the entryman on unproven homestead entry land, and that the equitable ownership of the land embraced in the homestead entry is in the entryman, and ripens into legal title as above set forth. The earlier United States decisions were to the effect that a mortgage was a conveyance within the provisions of §§ 2262 and 2296 of the U. S. Rev. Stat., and therefore void. These early Federal decisions were followed by the early decisions in Kansas, California, and Minnesota. Such holding, however, has been overruled in all of

those jurisdictions, as will be noticed from the following later authorities:

*Bogan v. Edinburgh American Land Mortg. Co.* 11 C. C. A. 128, 27 U. S. App. 346, 63 Fed. 192; *Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121; *Gilbert v. McDonald*, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712; *Lang v. Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88; *Weber v. Laidler*, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *Brazee v. Schofield*, 2 Wash. Terr. 209, 3 Pac. 265; *Rogers v. Minneapolis Mach. Co.* 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; *Dale v. Griffith*, 93 Miss. 573, 136 Am. St. Rep. 546, 46 So. 543; *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486; *Kirkaldie v. Larrabee*, 31 Cal. 456, 89 Am. Dec. 205; *Christy v. Dana*, 34 Cal. 548, and *Christy v. Dana*, 42 Cal. 174; *Kneen v. Halin*, 6 Idaho, 621, 59 Pac. 14; *Camp v. Grider*, 62 Cal. 20; *Whitney v. Buchman*, 13 Cal. 536; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; *Fuller v. Hunt*, 48 Iowa, 163; *Spiess v. Newberg*, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Jones v. Yoakam*, 5 Neb. 265; *Bellinger v. White*, 5 Neb. 399; *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453; *Wilcox v. John*, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880; *Hubbard v. Mulligan*, 13 Colo. App. 116, 57 Pac. 738; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan. 66, 1 Pac. 319; *Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. 571; *Schneider v. Hutchinson*, 76 Am. St. Rep. 480, and note, 35 Or. 253, 57 Pac. 324; *Barnady v. Colonial & U. S. Mortg. Co.* 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166; *Larson v. Weisbecker*, 1 Land Dec. 409; *Re Ray*, 6 Land Dec. 340; *Haling v. Eddy*, 9 Land Dec. 337.

That the land is earned after five years' compliance with law without further act, and the vested equitable title is then in the entryman, see *Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. 571; *Bogen v. Edinburgh American Land Mortg. Co.* 11 C. C. A. 128, 27 U. S. App. 346, 63 Fed. 192; *United States v. Breyberg*, 32 Fed. 195; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; see note in 79 Am. St. Rep. 916; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Kneen v. Halin*, 6 Idaho, 621, 59 Pac. 14; *Egbert v. Bond*, 148 Mo. 19, 49 S. W. 873;

*Dale v. Griffith*, 93 Miss. 573, 136 Am. St. Rep. 546, 46 So. 543; *Belinger v. White*, 5 Neb. 399.

That the final proof is no part of the consideration, but merely evidence to satisfy the government that the right of the grantee is perfect, that he has complied with the homestead laws, and is entitled to patent, the issuing of which is but a ministerial act, see *Brazee v. Schofield*, 2 Wash. Terr. 209, 3 Pac. 265; *Stoddard v. Chambers*, 2 How. 284, 11 L. ed. 269; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063.

The rights of the homesteader under the patent, on issuance of the same, relate back to the original entry, and all rights thereunder inure to the settler from the date of his entry. *United States v. Fryberg*, 32 Fed. 195; *Bernardy v. Colonial & U. S. Mortg. Co.* 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166. Immediately on entry the entryman thereby acquired an inchoate right in and to the land homesteaded. *Bergstrom v. Svenson*, 20 N. D. 55, 126 N. W. 497; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112. This right is pledged him by the homestead laws that the premises homesteaded shall be his in fact so long as he complies with legal requirements under which the same is so held; and that the government, as a trustee for him, will convey to him the legal title on his full performance of its requirement of five years' bona fide residence upon, cultivation and improvement of, the tract homesteaded.

The interest, then, of the plaintiff, while but slight in the beginning, became perfected into a full equitable title, to which the mortgage could and did attach long prior to the bankruptcy proceedings; so that at the time of the bankruptcy, this mortgage was not hovering above this land, but instead was upon it, an existing lien under which the entire equitable title of the plaintiff was pledged as security to the defendant for performance of the contract to pay, and covenants contained in and a part of the mortgage instrument. And it remained unpaid and unsatisfied, while the plaintiff mortgagor converted her equitable title into the legal title by offering her final proof, and procuring patent to the land upon which rested this mortgage.

At such time, immediately upon the issuance of patent, our state statute, § 6155, became operative, not as of the date of proof, but as of the date of the execution and delivery of the mortgage, under the doctrine of relation back, provided for in the statute (§ 6155, Rev. Code of 1905), reading: "Title acquired by the mortgagor subsequent to the

execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution." The statute then, as between mortgagor and mortgagee, gives the effect to the mortgage the law would have given the mortgage, had the mortgagor possessed the legal title at the time of the mortgaging of the property, title to which was subsequently acquired. Besides this, the law invokes an estoppel against the mortgagor, and refuses to permit the mortgagor to deny the validity of the mortgage. The plaintiff having covenanted with the mortgagee that she owned the land in fee simple; that the same was free from encumbrance; that she had good right to convey the same, and that the mortgagee should, in case of title acquired thereunder, enjoy quiet and peaceable possession of said premises, all this as security for her promise contained in the mortgage, to pay the mortgagee the amount secured thereby,—in equity she cannot be heard to deny such recitals and covenants, and assert the contrary, to defeat the very object for which she gave the mortgage. Such covenants, in the absence of the statute, would have caused the after-acquired title to have inured by estoppel to the benefit of the mortgagee. In the first instance, then, the statute in legal effect casts the encumbrance back to the date of its execution, to be enforced in all particulars as valid from that date; and, in the second instance, plaintiff is barred by estoppel from asserting the invalidity of the mortgage through her lack of title, contrary to the covenants of her mortgage contract. Whether she acquired the title for the benefit of the mortgagee under his mortgage, or, instead, acquired the title with the purpose of defeating the mortgage, as she has evidently done in this case, is immaterial, as equity conclusively presumes she completed the title for the benefit of the mortgagee. *Smith v. Hogue*, 19 N. D. 337, 123 N. W. 827.

*Yerkes v. Hadley*, 5 S. D. 324, 2 L.R.A. 363, 40 N. W. 340; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286; *Tucker v. Tucker*, 122 App. Div. 308, 106 N. Y. Supp. 713; and many of the authorities cited as supporting the validity of the mortgage.

It is immaterial, then, as to what was done in the bankruptcy proceedings, the bankruptcy statute by express terms excepting liens and mortgages from its operation. It is true the debt secured by the mortgage was long past due, and was for an amount certain and ascertainable, but the covenant to pay the debt ran with the land, and was unaffected

by the bankruptcy proceedings. Bankruptcy does not discharge a debt in the full sense or as results from a payment of the debt. Bankruptcy simply affects the remedy for the collection of the debt, and bars such remedy. The debt actually still exists, and may be a valid consideration for a new promise to pay or perform. The bankruptcy statute has relation to the remedy for the collection of the debt by court process, but leaves intact the remedy for collection of the still existing debt by lien foreclosure. The obligation to pay the debt, so far as suit thereon is concerned, is discharged, but the right to enforce payment thereunder because of the lien is unaffected, the debt remaining so secured. Such being the case, the mortgage still remains a lien by voluntary act by contract, upon the premises in question, unaffected by the bankruptcy.

*Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Citizens' Loan Asso. v. Boston & M. R. Co.* 19 Am. Bankr. Rep. 650, 196 Mass. 528, 14 L.R.A.(N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 A. & E. Ann. Cas. 365; *Christy v. Dana*, 34 Cal. 548, and same case again in 42 Cal. 175; *Paxton v. Scott*, 66 Neb. 385, 92 N. W. 611; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703, 5 Cyc. 354; 3 *Remington*, Bankr. §§ 2668-2672 and 2673.

This brings us to the consideration of the rights of the mortgagor and her husband in the land, under the homestead statutes granting them by law, as the head of a family, 160 acres of land exempt from judgment lien and from execution or forced sale thereunder, as defined and provided in § 5049, Rev. Code, 1905. The statute (§ 6155), heretofore referred to, provides that the title acquired by the mortgagor inured to the benefit of the mortgagee in like manner as if acquired before execution. As against the mortgagor, the wife, the mortgage is valid, unless the property mortgaged is relieved therefrom because of its being impressed with a homestead character. The mortgage came into existence a year before the marriage. It was recorded immediately, and constructive notice thereof given the husband prior to his residence with the wife on the land. In this connection we might remark that the earlier cases held to the doctrine that, inasmuch as title was derived from the government by patent, the purchaser or intending mortgagee need not look farther in the record than to the patent, and that instruments of record preceding the patent were not constructive notice. This theory, being developed along with the early rule holding the invalidity of mortgage executed before patent, under the doctrine that a mortgage

was an alienation, has been abrogated by the latter decisions as has the early doctrine touching the validity of mortgages on homesteads prior to final proof. See *Bernardy v. Colonial & U. S. Mortg. Co.* 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166, and cases cited. The husband, then, has had full notice of the rights of the defendants, since, prior to the time he could, under the homestead statute, have claimed the land was so exempt.

But any homestead rights of the family came under, and are dependent upon, the title of the wife, the entrywoman. When the law cast the family's homestead rights upon this land, the prior right by mortgage of the defendants existed thereon. Surely, if the wife's title was sufficient to be a foundation for the operation of the state homestead exemption, it was a mortgagable interest sufficient that the mortgage long prior thereto had attached. The homestead exemption is dependent entirely upon the estate and interest of the owner thereof, and is subject to her legal and valid contracts. It is secondary to the wife's title, and dependent upon it, and cannot exceed the wife's rights or modify the wife's title. See *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245; *Ferris v. Jensen*, 16 N. D. 462, 114 N. W. 372; *Kneen v. Halin*, 6 Idaho, 621, 69 Pac. 14; *Rogers v. Minneapolis Mach. Co.* 48 Wash. 19, 92 Pac. 774. The husband, coplaintiff, must base the family homestead exemption upon the wife's title, and he, like the wife, is, by the statute, concluded by the recorded mortgage imputing notice to him. The homestead exemption could not be given retroactive force in any event; certainly not beyond the time when it could have existed. The mortgage, being valid when given, remained unaffected by the homestead exemption subsequently coming into existence.

For the foregoing reasons, the mortgage of the defendants upon the tract homesteaded and described in the pleadings is a valid and existing lien thereon, for the full amount thereof, and defendants are entitled to a decree that the premises be sold under foreclosure to enforce payment of said mortgage, together with costs to defendants in district court, to which should be added the costs of this court on appeal; and that the judgment of the lower court heretofore entered be reversed and set aside, and that said court enter judgment in conformity herewith.

**ALBIN HEDLIN v. JOHN J. LEE**, as Sheriff of Ward County, North Dakota, Jennie E. Gjertsen, George H. Gjertsen, Charles A. Lind, Henry A. Barnes, and Nathan M. Barnes.

(131 N. W. 390.)

**Mortgages—Power of Sale—Good Faith of Mortgagee in Foreclosing—Tender.**

1. In an action to quiet title to a quarter section of land in Ward county, defendants assert rights based on certain foreclosure proceedings by advertisement and a sheriff's deed issued pursuant thereto. The mortgage was given to secure the payment of the sum of only \$25. Prior to the commencement of the foreclosure proceedings, plaintiff, in good faith, offered to pay the sum due, which was refused, but he failed to technically comply with the statute in making a tender, or in keeping such tender good by subsequently depositing the amount in a bank in conformity to the statute, and by giving the creditor notice thereof, although he, in fact, deposited in a bank the amount then due, lacking 35 cents. With knowledge of plaintiff's willingness and desire to pay whatever was owing, the holder of such mortgage caused foreclosure proceedings to be commenced by the publication of notice of sale in a newspaper published about 70 miles from the land, when there were newspapers in the immediate vicinity thereof, for the evident purpose of keeping plaintiff in ignorance of such foreclosure proceedings. On the day appointed for sale, the premises were struck off to the holder of the mortgage for the paltry sum due, with costs, she evidently being the sole bidder at the sale. Plaintiff acquired no actual knowledge thereof until after such sheriff's deed was issued. In the light of the above and other facts stated in the opinion;

*Held*, that the power of sale contained in such mortgage was not exercised in good faith, and the foreclosure sale and the sheriff's deed are null and void.

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Note.—That a power of sale in a mortgage must be exercised by the mortgagee fairly and in good faith is universally recognized, and, while mere inadequacy of price at a sale under a power contained in a mortgage does not necessarily render the sale invalid, nevertheless, gross inadequacy of price is generally regarded as evidence of fraud sufficient to require the setting aside of the sale. And the rule also generally prevails that a mortgagee with power to sell is a trustee, and therefore as such is not alleged to purchase directly or indirectly at his own sale, so as to render the sale binding or cut off the equity of redemption, unless the mortgage confers such right or the mortgagor consents to such purchase. Such sale and purchase are not, however, void, but voidable merely, at the election of the mortgagor, and they are valid for all purposes if made fairly and without fraud, except that the mortgagor or those claiming under him may redeem within a reasonable time. The authorities on these questions are reviewed in elaborate notes in 92 Am. St. Rep. 573, and 103 Am. St. Rep. 51.

**Mortgages — Foreclosure under Power of Sale — Good Faith.**

2. The person having the right to exercise a power of sale in a mortgage is bound to the exercise of the utmost good faith and fair dealing towards the mortgagor or owner of the premises, and a mere technical or literal compliance with the statute by him is not alone sufficient.

**Mortgage — Good Faith in Foreclosing under Power of Sale.**

3. The fact of the apparent gross inadequacy of price, coupled with the other facts, not only fully justifies, but requires, a court of equity to find that the power of sale was exercised in bad faith, and to adjudge to be invalid all proceedings under such attempted foreclosure.

Opinion filed March 25, 1911. Rehearing denied May 18, 1911.

Appeal from District Court, Ward county; *Charles F. Templeton*, Judge.

Action by Albin Hedlin against John J. Lee, sheriff of Ward county, and others. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

*Murphy & Woledge*, for appellant.

*John E. Greene, W. H. Campbell, and Palda, Aaker, Greene, and Kelso*, for respondents.

**FISK, J.** The facts necessary to a correct understanding of the questions involved on this appeal are as follows:

In January, 1903, one Peter Rosenlund made final proof for the land in dispute, and thereafter patent was issued to him by the United States government. On January 17, 1903, Rosenlund executed to defendant, Nathan M. Barnes, two mortgages covering such land, one to secure the payment of the sum of \$500 due in five years with interest at 8 per cent, and one to secure the payment of \$25 payable in equal annual instalments of \$5 each, representing the additional interest of 1 per cent on such loan. The validity of these mortgages is not questioned, and they were duly satisfied of record prior to the commencement of this action.

Defendant George H. Gjertsen, acted as attorney or agent for Rosenlund in making such final proof and in procuring such loan. On January 26, 1903, plaintiff, Hedlin, purchased the land in controversy from Rosenlund for the stipulated consideration of \$1,600 payable as follows: \$150 cash, \$475 November 1, 1903, \$475 November 1, 1904,



and the assumption by plaintiff of the Barnes mortgage aforesaid. Such purchase price was paid, and the land deeded to Hedlin by Rosenlund in October, 1904. Prior to entering into the written contract for such purchase, Hedlin acquired knowledge of the \$25 mortgage, and the vendor, Rosenlund, thereupon agreed to pay the same, and finally it was agreed that Hedlin should also assume such mortgage and deduct the amount thereof from the cash payment to be made by him.

These parties thereafter employed defendant Gjertsen to draw the contract of sale, and either immediately prior or subsequent to the execution of such contract, Gjertsen demanded of Hedlin the settlement of a further claim of \$25, which he asserted was due Barnes Brothers for additional interest on the mortgage given by Rosenlund, and he offered to take a third mortgage for such amount, or in lieu thereof \$20 in cash, stating that if not settled the mortgagees would foreclose. Hedlin did not at that time agree to pay this claim, but, on or about April 1, 1903, Gjertsen induced him to execute a mortgage for \$25 to Barnes, which mortgage he forwarded to Barnes Brothers, who subsequently assigned the same to Mrs. Gjertsen, and such assignment was recorded in January, 1904. Subsequently Gjertsen, acting for his wife, the assignee thereof, foreclosed such mortgage by advertisement, causing the notice of sale to be published at Minot, and plaintiff did not learn of the foreclosure proceedings until after a sheriff's deed had issued. Immediately upon learning such facts, plaintiff instituted this action to cancel such mortgage and the sheriff's deed, and to quiet title, and such sheriff's deed is the basis of the adverse claims of the defendants herein. The power of attorney authorizing the foreclosure was executed on December 2, 1904, and the first publication of notice of sale was made on December 8, 1904. The sheriff's deed was issued to Mrs. Gjertsen soon after the expiration of the year of redemption, and very soon thereafter she deeded the land to her father, defendant Charles A. Lind, who soon thereafter executed and delivered to defendant Henry A. Barnes mortgages under which Barnes Brothers now claim a lien on the land.

It is appellant's contention (1) that there was no consideration for the \$25 note and mortgage; (2) that there was a valid and legal tender made by plaintiff to Gjertsen prior to the commencement of the foreclosure proceedings, of the amount apparently due thereon, which tender operated in law to divest the lien of such mortgage; (3) that the notice

of sale, as published, is vitally defective in not stating that the assignment of the mortgage to Mrs. Gjertsen had been recorded; (4) that in taking the mortgages from defendant Lind, defendant Henry A. Barnes had full knowledge of the facts, and is not an innocent encumbrancer; and (5) that the foreclosure sale was for a sum in excess of the amount due, and that the notice of sale is void, because the amount therein claimed to be due was in excess of the amount apparently due.

The conclusion reached by us renders it unnecessary to notice all of appellant's contentions. We are agreed that the judgment must be reversed, and will, as briefly as possible, state our reasons for such conclusion.

Whether there was any consideration for the \$25 note and mortgage which was foreclosed, or whether plaintiff's alleged tender was technically sufficient, is not very material, as a determination of these questions adversely to appellant's contention would in no manner be controlling as to the principal question in litigation. We shall decide the case on the assumption, which we think is correct, that the trial court correctly decided both of these questions.

The testimony fairly discloses that sometime in the fall of 1904, and prior to the commencement of the foreclosure proceedings, plaintiff called upon Gjertsen for the express purpose of paying the instalments due on such mortgage indebtedness, and requested of him information as to the amount due; that Gjertsen, representing his wife, refused to furnish such information, and declined to accept any sum unless certain alleged costs of foreclosure were also paid. At that time the first instalment of \$5 due December 1, 1903, with interest at 7 per cent, was unpaid, and on December 1, 1904, the second instalment became due, so that the utmost amount due on the latter date was \$10.35. Plaintiff made known to Gjertsen his desire and ability to pay whatever was then due. It is true he did not actually produce the currency and tender it, for the reason, as stated by him, that he did not know the exact sum then due, but we think Gjertsen's attitude at that time was such as to clearly operate as a waiver of a formal tender, and defendants ought not to be heard to urge the contrary. There could not legally have been at that date any accrued costs of foreclosure, as the power of attorney from Mrs. Gjertsen to her husband, authorizing such foreclosure, was not executed until later. Counsel for respondent in their printed brief state that the foreclosure was commenced on December 8th. They urge

and rely upon the fact that plaintiff did not technically comply with the Code provisions regarding a tender. Conceding this, the fact remains that plaintiff, in good faith, called on Gjertsen, and made known to him his willingness and desire to make his defaults good by paying whatever sum was due and owing at that time, and Gjertsen was fully apprised of the fact that it was wholly unnecessary to resort to the security for the collection of this paltry sum. The fact that plaintiff failed to keep the tender good by a technical deposit in a bank, in strict conformity to the statute, does not in the least militate against the important fact of Gjertsen's knowledge of plaintiff's good-faith attempt to satisfy such indebtedness. This is important as having a direct bearing on what we deem a controlling fact in the case, although not raised or discussed by counsel and apparently for this reason overlooked by the learned trial court, viz: The good faith of the Gjertsens in exercising the power of sale.

It is well settled that a power of sale in a trust deed or mortgage can be exercised by the donee of such power only in the utmost good faith, and that, in the absence of such good faith, the foreclosure is a nullity. 28 Am. & Eng. Enc. Law, 2d ed. 765, and cases cited; see also Briggs v. Briggs, 135 Mass. 306; Clark v. Simmons, 150 Mass. 357, 23 N. E. 108.

In Briggs v. Briggs the supreme judicial court of Massachusetts said: "In executing the powers of sale, the defendant acted as trustee and agent for the plaintiff, and it was his duty, if he would himself be the purchaser, not only to conform to the terms of the powers, but to use the utmost good faith and diligence to protect the interests of his principal." And in Clark v. Simmons, that eminent tribunal again said: "It has repeatedly been held in this commonwealth and elsewhere, that a mortgagee who attempts to execute a power of sale contained in the mortgage is bound to exercise good faith, and to use reasonable diligence to protect the rights and interests of the mortgagor under the contract. Montague v. Dawes, 14 Allen, 369; Drinan v. Nichols, 115 Mass. 353; Thompson v. Heywood, 129 Mass. 401; Briggs v. Briggs, 135 Mass. 306. If he fails to do his duty in this respect, a mere literal compliance with the terms of the power will not render the sale valid against the mortgagor, in favor of one charged with knowledge of the delinquency, although it may be sufficient if the purchaser is a stranger who buys in good faith. In determining whether, in a particular case, a mortgagee

has acted in good faith and with a due regard for the interests of the mortgagor, the nature of his authority must be considered. . . . It is his duty, for the benefit of the mortgagor whom he represents, so to act in the execution of the power as to obtain for the property as large a price as possible. Ordinarily, the parties stipulate in the mortgage what kind of notices of sale shall be given, and, ordinarily, a mortgagee is not required to give a notice of a different kind; so far as the mortgage leaves him a power of selection of methods of giving notice and of making the sale, he is to act reasonably, and exercise a sound discretion. . . . Good faith and a reasonable regard for the interests of the mortgagor will not permit him to make a sale when no one will offer a price which an owner could reasonably think of accepting, if he were obliged to sell the property at a day's notice for what it would bring. In such a case, where the notices given have failed to accomplish the purpose which the contracts contemplated that they would accomplish, it is the duty of the mortgagee, if he would make a sale, properly to represent, not only his own rights to have the estate sold for his benefit, but also the right of the mortgagor to have an auction sale such as both parties must be presumed to have contemplated by their contract, and to get for the property as much as it can reasonably be made to bring. Under such circumstances he should do what a reasonable man would be expected to do to accomplish that result. A failure to do that would be evidence of a want of good faith, and such a neglect, without an active purpose to defraud, would invalidate the sale, unless it was made to a stranger who bought in good faith."

What are the facts in the case at bar bearing upon the good faith of the Gjertsens in exercising the power of sale? They knew of plaintiff's willingness and desire to pay the indebtedness, and it is fair to assume from the record that they purposely refused to receive such payment, believing that they might, through foreclosure proceedings, obtain a quarter section of land for this paltry debt. Their entire conduct lends countenance to this theory. They caused notice of the foreclosure sale to be published about 70 miles distant from the land, while there were two papers published in the immediate vicinity thereof. The land was bid in at the sale to Mrs. Gjertsen for the sum of \$26.96 and the costs of foreclosure, including an attorney's fee of \$25. That she was the sole bidder at the sale is apparent, and that the price bid was grossly inadequate there can be no doubt. The sheriff's deed was issued

to her on January 25, 1906, and almost immediately thereafter she and her husband transferred the land to Lind, her father, for the stipulated consideration of \$1,500, and the latter executed to Barnes the two mortgages under which Barnes Brothers assert a lien upon the property.

While neither the publication of the notice of foreclosure sale at Minot, nor the inadequacy of price at which the property was sold, are, standing alone, sufficient to avoid the sale, we think all the facts, when considered together, clearly establish a want of good faith on the part of the Gjertsens in exercising such power of sale, and a total disregard of the rights of the mortgagor. Speaking upon the question of the effect of inadequacy of price, our sister state of South Dakota has said: "A court of equity, in the exercise of its equitable powers, will scrutinize with care sales made under powers of sale contained in the mortgage; and where there is a great inadequacy of consideration it will be astute in extracting from the facts of the case sufficient to justify annulling the sale. . . . The fact that property of the value of \$600 was sold for \$10.60 clearly shows either mistake or fraud; and we apprehend no court of equity would refuse to relieve the party from such sale." *Stacy v. Smith*, 9 S. D. 137, 68 N. W. 198.

In *King v. Platt*, 37 N. Y. 155, it was said: "A court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on very slight evidences of unfair dealing, whether it is made necessary by moral turpitude or only by a mistaken estimate of others' rights." See also 28 Am. & Eng. Enc. Law, pp. 798, 799, citing *Flint v. Lewis*, 61 Ill. 299; *Webber v. Curtiss*, 104 Ill. 309; *Thompson v. Heywood*, 129 Mass. 401; *Stewart v. Hamilton Bldg. & L. Asso.* — Tenn. —, 47 S. W. 1106. In the latter case the court, after referring to the fact that the notice of sale was published in an obscure paper in order to escape observation, and also the fact that the property brought not to exceed one third of its value, said: "It was practically a case of collusion between the trustee and the beneficiary to obtain the property for less than its value. Such conduct cannot be tolerated in a court of equity. The obligation of good faith rests upon the trustee and the beneficiary in enforcing the trust deed. Any substantial departure from good faith would necessitate the setting aside of the sale by a court of equity." *Flint v. Lewis*, 61 Ill. 299 in many respects is quite analogous

to the case at bar, and the sale under a power in a trust deed was held a nullity. See also *Webber v. Curtiss*, 104 Ill. 309.

For the above reasons, we hold that the foreclosure sale and the sheriff's deed issued thereunder, as well as the deed from the Gjertsens to Lind, should be set aside as null and void; it being apparent from the evidence that the latter is not an innocent purchaser in good faith and for value. The fact that plaintiff's counsel have not raised this question is no reason why a court of equity may not award to plaintiff the relief to which he is entitled under the evidence.

It only remains to determine the rights of Barnes Brothers, who claim to be innocent mortgagees. They do not stand in the attitude of innocent purchasers at the foreclosure sale, but merely claim liens under mortgages executed and delivered by Lind, the vendee, in the deed from the Gjertsens to him. In the light of the undisputed fact that plaintiff has been in actual possession of the premises at all times since the date of his purchase from Rosenlund, it appears to us to be elementary that such mortgagees must be deemed to have become such with full knowledge of plaintiff's rights in the land, plaintiff's actual possession being notice to the world that he claimed an interest in such real property, and by due inquiry Barnes Brothers would have learned of the extent of such interest. It is perfectly apparent that Barnes Brothers could not have become innocent purchasers of such premises from Lind, and it logically follows, therefore, that they could not become innocent mortgagees.

The record discloses that the indebtedness secured by the original \$500 mortgage executed and delivered by Rosenlund to Nathan Barnes, and the payment of which was assumed by plaintiff, has not been paid by him, but that such mortgage was satisfied of record, and the amount thereof included in the mortgage from Lind to Barnes. In view of this, plaintiff is not entitled to the relief prayed for without first doing equity by paying to Barnes Brothers the amount of such indebtedness still unpaid (said \$500 and interest).

Our conclusion is that the judgment appealed from be reversed, and the District Court take an account of the amount, if any, still unpaid on the indebtedness secured by such \$500 mortgage, and also the amount due on the \$25 note secured by the mortgage which was attempted to be foreclosed; and upon the payment to the persons entitled thereto of

the respective sums thus found to be due, plaintiff's title be quieted as prayed for, appellant to recover his costs on this appeal.

MORGAN Ch. J., not participating; Justice Goss, being disqualified, Hon. W. H. WINCHESTER, Judge of the Sixth Judicial District, sat in his place by request.

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## MARTHA CHRISTINA TUTTLE v. OLE B. TUTTLE.

(131 N. W. 460.)

### Appeal and Error — Divorce — Alimony.

1. The plaintiff was awarded a decree of divorce from the defendant on the ground of extreme cruelty, the custody of their four small children was given to the plaintiff, and permanent provision made for her from the property of the defendant. This court granted an application on the part of the plaintiff after an appeal by the defendant from the decree, for funds with which to maintain herself and children pending the determination of the appeal, and entered an order requiring him to pay her, for such purpose, certain sums at stated intervals. With this order he failed to comply, except to a small extent, and, on an order to show cause why he should not be punished for contempt by reason of his disobedience of the order of this court, he failed to purge himself of such contempt. The appeal and the order to show cause were argued together.

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Note.—Many divorce cases involve the making of false charges of adultery, but the decisions which have turned solely upon the question whether a false charge of adultery will justify the granting of a divorce are limited. It has been said that the general rule is that unfounded charges of adultery do not constitute such cruelty as to warrant the granting of a divorce, but this seems scarcely to be borne out by the cases, as shown by an extensive review thereof in a note in 18 L.R.A. (N.S.) 300. It is difficult to formulate any general rule from the cases, except that unfounded charges of adultery, if made with sufficient aggravation and persistency, are a ground for divorce, but what will be regarded as sufficient aggravation is largely dependent upon the form of the statute and its construction in the particular jurisdiction in which the question is presented. This question is also treated in a note in 65 Am. St. Rep. 80.

The question of compelling payment of alimony by contempt proceedings, which is also involved in TUTTLE v. TUTTLE, is considered in a note in 24 L.R.A. 433, and inability to pay alimony, as defense to contempt proceedings for failure to pay, is the subject of a note in 30 L.R.A. (N.S.) 1001.

*Held*, that under the facts and circumstances of this case, this court will not review his appeal from that part of the decree relating to permanent maintenance of the wife and children.

**Divorce — Sufficiency of Evidence — Corroboration.**

2. Provisions of § 4069, Rev. Code 1905, to the effect that no divorce can be granted upon the uncorroborated statement, admissions, or testimony of the parties, is intended to prevent collusion, and, following *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, it is held that where the facts and circumstances of a divorce case are such as to preclude any possibility of collusion, and the court is convinced from the facts, of the justice of the plaintiff's cause, only slight corroboration is necessary to sustain a decree in her favor.

**Divorce — Extreme Cruelty — Corroboration.**

3. Certain testimony examined, and, *held*, that, irrespective of the forgoing rule, the testimony of the plaintiff as to the acts of the defendant is amply corroborated.

Opinion filed April 25, 1911.

Appeal from District Court, Traill county; *Pollock*, Judge.

Action by Martha Christina Tuttle against Ole B. Tuttle. Judgment for plaintiff, and defendant appeals.

Affirmed.

*F. W. Ames* and *Skulason & Burtness*, for appellant.

There must be corroboration. *Kuhl v. Kuhl*, 124 Cal. 57, 56 Pac. 629; *Berry v. Berry*, 145 Cal. 784, 79 Pac. 531; *Ashburn v. Ashburn*, 101 Mo. App. 365, 74 S. W. 394; *Daeters v. Daeters*, — N. J. Eq. —, 38 Atl. 950; *Moak v. Moak*, — N. J. Eq. —, 48 Atl. 394; *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71.

Corroboration must be of the material allegations. *Ortman v. Ortman*, 92 Mich. 172, 52 N. W. 619; *Potter v. Potter*, 75 Iowa, 211, 39 N. W. 270; *Grady v. Grady*, — N. J. Eq. —, 64 Atl. 440; *Gunther v. Gunther*, — N. J. Eq. —, 57 Atl. 1015; *Hunt v. Hunt*, — N. J. Eq. —, 59 Atl. 642; *Corder v. Corder*, — N. J. Eq. —, 59 Atl. 309; *Goodhues v. Goodhues*, 90 Md. 292, 44 Atl. 990; *Luther v. Luther*, 87 Ill. App. 241; 14 Cyc. 688, 689; *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518; *Haley v. Haley*, 67 Cal. 24, 7 Pac. 3.

Cruelty occasioned by abusive language and obscene habits is a relative term, and, while affording ground for divorce to one wife, would not to another. *Knight v. Knight*, 31 Iowa, 451; *McAllister v. McAllister*, 7 N. D. 324, 75 N. W. 256; *Rindlaub v. Rindlaub*, 19 N. D.



352, 125 N. W. 479; Watrous v. Watrous, 155 Mich. 78, 118 N. W. 725; Paden v. Paden, 28 Neb. 275, 44 N. W. 228; Hancock v. Hancock, 55 Fla. 680, 15 L.R.A.(N.S.) 670, 45 So. 1020; Shuster v. Shuster, 3 Neb. (Unof.) 610, 92 N. W. 203; Bennett v. Bennett, 24 Mich. 482; Bain v. Bain, 79 Neb. 711, 113 N. W. 141; 14 Cyc. 599.

The court cannot order conveyance of property by defendant, nor make a money judgment a specific lien on property. Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594; 14 Cyc. 780; Doe v. Doe, 52 Hun, 405, 5 N. Y. Supp. 514; Calame v. Calame, 25 N. J. Eq. 548; Perkins v. Perkins, 16 Mich. 162; Donovan v. Donovan, 20 Wis. 587; Bacon v. Bacon, 43 Wis. 197; Moul v. Moul, 30 Wis. 203; Brenger v. Brenger, 142 Wis. 26, 26 L.R.A.(N.S.) 387, 135 Am. St. Rep. 1050, 125 N. W. 109, 19 A. & E. Ann. Cas. 1136; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 A. & E. Ann. Cas. 464; Washington v. Washington, 78 Neb. 741, 111 N. W. 787; Brotherton v. Brotherton, 14 Neb. 186, 15 N. W. 347; Swansen v. Swansen, 12 Neb. 210, 10 N. W. 713; Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885; Ecker v. Ecker, 22 Okla. 873, 20 L.R.A.(N.S.) 421, 98 Pac. 918.

*Chas. A. Lyche*, for respondent.

Defendant's conduct towards plaintiff constituted cruel and inhuman treatment. Craig v. Craig, 129 Iowa, 192, 2 L.R.A.(N.S.) 669, 105 N. W. 446; Hooe v. Hooe, 122 Ky. 590, 5 L.R.A.(N.S.) 729, 92 S. W. 317, 13 A. & E. Ann. Cas. 214; Page v. Page, 43 Wash. 293, 6 L.R.A.(N.S.) 914, 117 Am. St. Rep. 1054, 86 Pac. 582; Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99; Bechtel v. Bechtel, 101 Minn. 511, 12 L.R.A.(N.S.) 1100, 112 N. W. 883.

Corroboration need not extend to all of plaintiff's testimony. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988; Lewis v. Lewis, 75 Iowa, 200, 39 N. W. 271.

Corroboration is to guard against collusion; where there is no collusion, the rule is less strict. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46; Baker v. Baker, 13 Cal. 88; Billings v. Billings, 11 Pick. 461; Jones v. Jones, 17 N. J. Eq. 351; Madge v. Madge, 42 Hun, 524; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Venzke v. Venzke, 94 Cal. 225, 29 Pac. 499; McAllister v. McAllister, 28 Wash.

613, 69 Pac. 119; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

Court can award specific property to support divorced wife and children. *Greenleaf v. Greenleaf*, 6 S. D. 348, 61 N. W. 42; *Rev. Code*, §§ 6724 and 6733; *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221; *Hooper v. Hooper*, 102 Wis. 598, 44 L.R.A. 725, 78 N. W. 753; *Piatt v. Piatt*, 9 Ohio, 37; *Gallagher v. Fleury*, 36 Ohio St. 590; *Smith v. Smith*, 45 Ala. 264; *White v. Com.* 110 Pa. 90, 1 Atl. 33; *Herrick & D. Probate Law & Pr.* p. 192; 18 Cyc. 373, 382.

The form and quantity of allowance was proper. *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221; *Hooper v. Hooper*, 102 Wis. 598, 44 L.R.A. 725, 78 N. W. 753.

SPALDING, J. This is an appeal from a decree of the district court of Traill county granting the respondent an absolute divorce from the appellant on the ground of extreme cruelty, and giving the custody and control of four small children, issue of the parties, to the respondent, and awarding to her permanent alimony. The parties were married in September, 1898, at Hillsboro, North Dakota, and resided for a number of years upon the appellant's farm near Mayville, but later they moved into the city of Mayville, and at the time of the trial resided there. The appellant was the owner of 960 acres of valuable land, which he had allowed to go to sale on a judgment for less than \$300, and had then arranged with his brother to redeem it. The evident purpose of this was to place it beyond reach in case of the final separation of himself and wife, they having had trouble for some years. However, at the time of the trial, he had a deed of the premises from the brother to himself, which had not been recorded, and an attempt had been made to erase appellant's name as grantee therein. He also claimed to have disposed of all his personal property, valued at several thousand dollars, to his sons by a former marriage, and to have leased his land. The district court made the necessary orders to provide maintenance for the wife and children during the pendency of the litigation in that court. The circumstances were such that respondent made application to this court for an allowance pending the decision of the appeal, and her application resulted in an order being entered requiring the appellant to make certain payments within specified times. He went to the British possessions, and failed to make such payments, and, on being cited to

show cause why he should not be punished for contempt of this court by reason of his disobedience to its order, he attempted to show that it was impossible for him to raise the necessary funds. We are satisfied that a man who is the owner of valuable property situated as stated, and reasonably productive, and he himself in the full possession of his physical and mental faculties, could readily have secured the necessary funds, to comply with our order, and that he made no good-faith effort to do so; that, on the contrary, since the beginning of this litigation, he has done everything which his ingenuity suggested, to place his property beyond the reach of any process issued in the divorce proceeding, and to lay the foundation for an attempt to purge himself of contempt, if necessary. Appellant is not in position, in this court, to complain of the permanent allowance made by the final decree of the district court. He is in contempt, not innocently so, but purposely and studiously disobeying our order, leaving the wife and four small children unprovided for and with no means of sustenance, except possibly very trifling earnings of the wife and the charity of various acquaintances. We shall therefore decline to review the decree of the trial court as far as it relates to the permanent allowance. Other reasons for declining to investigate this allowance are suggested on argument, but, for some cause, do not appear in the record; hence they only lend moral support to our conclusion that no injustice is being done the appellant on this feature of the appeal. We refer to the statement which, as we understand, was not traversed, that the action of the trial court with reference to the property was pursuant to agreement of the parties.

We shall proceed to consider briefly the merits of the controversy. The record is long, and a specific review of the evidence would be without any value. A great number of acts of cruelty were testified to on the part of the plaintiff, and some of them sustained by the findings of the court. Some were admitted by the defendant. He, however, sought to destroy their effect by explanations which, in our judgment, failed to explain. Other instances of cruelty were denied, and, as to some, the testimony of the plaintiff was uncorroborated, and this lack of corroboration is the first error assigned. This feature can be disposed of by a single proposition. The statute (Rev. Code, § 4069) provides that "no divorce can be granted . . . upon the uncorroborated statement, admission, or testimony of the parties. . . ." And it is urged that, in an action where the testimony of the plaintiff is corroborated

as to only a part of the acts of cruelty, the rule is that she cannot prevail unless the corroborated acts are sufficient to justify a decree in her favor, regardless of her testimony as to uncorroborated acts of cruelty. Not all of the acts of which the respondent complained are corroborated. Some are fully corroborated, some are explained in a way, others are uncorroborated; and even though the corroboration is slight, if the acts testified to by her which are corroborated tend to show a cause for divorce, and the other acts are in harmony with those of which there is corroboration, that is, of a nature which the corroborated acts show he possessed the disposition to commit, it may with much reason be contended that all such acts are corroborated. In *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, this court fully considered the meaning of the section which we have quoted with reference to the necessity of corroboration. It was there held that the purpose of the statute must be inquired into in determining to what extent the testimony of the complaining party must be corroborated; that the object of the provision quoted is to prevent collusion, and that, where the whole case precludes any possibility of collusion, the corroboration need be very slight. In the case at bar we think the corroborated acts are sufficient to justify the decree entered by the trial court. The evidence, considered as a whole, show the coarse and brutal disposition of the appellant; that he had no appreciation of decency or propriety in his marital relations; that he was utterly lacking in the sense that is ordinarily found in male human beings of regard and care for the welfare and comfort of female members of their family. The corroborated evidence shows that he and his sons by a former marriage indulged in remarks about the plaintiff's condition when *enciente*, charging her with being made so by one of the hired men. They further joked about it among themselves in her presence. We have used the word "joke" in this connection, because that is the construction which he placed upon it. It may have been more serious than a joke, but the subject does not justify a public discussion even in a jocular manner, and would not be tolerated by any husband possessed of ordinary human instincts or of the slightest degree of decency. It is shown that this conduct inflicted upon her great mental suffering, and that it was frequently repeated in the presence of the respondent and of a large number of hired men and of appellant's children by a former marriage, and that when such children referred to the matter in the presence of appellant, in a laughingly, jeer-

manner, he did not reprimand them. The fact of the hired man being the father of the unborn child is negatived by evidence showing that he had come to this state too recently for it to have been possible. The court also found that, without cause or justifiable reason, the appellant had continuously subjected respondent to physical abuse, and had, by his treatment, inflicted upon her bodily injuries as well as mental suffering. Enough of this is corroborated to justify the conclusion of the learned trial court. The evidence also shows neglect of her at the time of confinement, and it was shown that he made an assault upon her in March, 1905, and pounded her until her arm was black and blue; and that she showed her arm to another person in his presence, and explained within his hearing how it occurred, and that he did not remonstrate or make denial. The evidence satisfies us of the truth of the allegations of the respondent and the correctness of the findings of the trial court and its decree in her favor. One other subject needs attention. As we have above shown, the order of this court making an allowance to her has been, in the main, ignored by appellant. The respondent will be allowed to make proof to the trial court of the amount unpaid upon such order, and the decree of that court will be amended to provide proper security for its payment by a lien upon a reasonable amount of his real property.

The decree of the District Court is affirmed.

MORGAN, Ch. J., not participating.

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LIZZIE WILLIAMS v. BURLEY E. COREY and Fred Gehring.

(131 N. W. 457.)

**Vendor and Purchaser — Cancellation of Contract — Action for Forfeiture.**

1. In October, 1905, plaintiff entered into an executory contract with C. for the sale to the latter of certain real property. Such contract is in the usual form, containing stipulations against the assigning of such contract by C., and authorizing plaintiff to declare a forfeiture in case of any default, by giving thirty days' notice of intention so to do. C. entered into actual occupancy of the property under the contract, and in July 1906, he sold his interest in the

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**Note.**—The rights of a bona fide purchaser from a vendee in possession before payment to the original vendor are considered in a note in 25 Am. Dec. 614.

land to G. for a valuable consideration, giving him a contract for a deed and putting him in possession thereunder, ever since which time G. has remained in actual occupancy of such land. C. defaulted in the payment of an installment due in October, 1907, and in February, 1908, plaintiff caused notice of intention to declare a forfeiture of the contract to be served on C. alone, although she had actual knowledge of G.'s purchase from C., and at no time objected thereto. Thereafter plaintiff prosecuted an action against C. alone, to obtain a decree declaring such contract forfeited, in which action C. made default, and judgment was entered in plaintiff's favor for the relief prayed for. The case at bar was subsequently commenced against both C. and G., the object of which is to foreclose any interest asserted by either in such land. G. alone defends, and offers to do equity by paying to plaintiff all sums which may be found due to her under her contract with C.

*Held*, for reasons stated in the opinion, that plaintiff is not entitled to recover, and that G. is entitled to the relief prayed for.

**Vendor and Purchaser — Forfeiture — Statutory Construction — Words and Phrases — "Assigns."**

2. Sections 7494 and 7495, Rev. Codes 1905, which prescribe the manner in which such contracts may be forfeited, provides for the service of written notice by the vendor upon "the vendee or purchaser, or his assigns."

*Held*, construing said sections, that the word "assigns" as thus used includes within its meaning vendees of the purchaser when known to the vendor, and that, in order to forfeit such contract as against the rights of G., it was incumbent on plaintiff to cause notice to be served on him as required by said statute.

Opinion filed April 26, 1911. Rehearing denied May 23, 1911.

Appeal from District Court, McHenry county; *Goss*, Judge.

Action by Lizzie Williams against Burley E. Corey and another. Judgment for defendant Gehring, and plaintiff appeals.

Affirmed.

*R. Goer, Guy C. H. Corliss, and L. D. Gooler*, of counsel, for appellant.

Reference to instrument gives constructive notice of its terms. *Tiedeman*, Real Prop. ¶ 817 b note 2, and cases cited; 27 Am. & Eng. Enc. Law, 2d ed. 508, 509.

Payment of an amount due on a foreclosure, by one bound to pay it, wipes out the foreclosure. 27 Cyc. 1865, 1866.

Assignee of vendee need not be served with notice of cancelation. Rev. Code 1905, § 7495.

To be a bona fide purchaser, one must get a legal title. 23 Am. & Eng. Enc. Law, 2d ed. 482, 483.

*Christianson & Weber*, for respondent.

Vendor retains legal title in trust for vendee. *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623; *Sheridan v. Reese*, 122 La. 1027, 48 So. 443; 2 Am. & Eng. Enc. Law, 2d ed. 1045; *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036.

Vendee has an interest that may be sold, mortgaged, taken on execution, or passed to a trustee in bankruptcy. *Brayton v. Jones*, 5 Wis. 117; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; *Stoddard v. Whiting*, 46 N. Y. 627; *Edwards v. McKernan*, 55 Mich. 520, 22 N. W. 20; *Brooke v. Eastman*, 17 S. D. 339, 96 N. W. 699; *Young v. Mitchell*, 33 Ark. 222; 16 Am. & Eng. Enc. Law, 2d ed. 726.

Notice of cancelation must be as provided in the contract. *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088; *Williams v. Kinney*, 43 Hun, 1; *Auxier v. Taylor*, 102 Iowa, 673, 72 N. W. 291.

Proof of return of notice of cancelation must be made by competent evidence. *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185; *Ball v. Peck*, 43 Ill. 482; *Vennum v. Vennum*, 56 Ill. 430.

Failure to object to assignment is assent thereto. *Ross v. Page*, 11 N. D. 458, 92 N. W. 822; *Peters v. Canfield*, 42 N. W. 125.

One seeking to cancel a contract of purchase of land for a default must act promptly. *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088; *Fergusson v. Talcott*, 7 N. D. 185, 73 N. W. 207; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149; *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408; *Timmins v. Russell*, 13 N. D. 487, 99 N. W. 48; *Bucholz v. Ledbetter*, 11 N. D. 473, 92 N. W. 830; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Quinn v. Olson*, 34 Minn. 422, 26 N. W. 230; *Ballard v. Cheney*, 19 Neb. 58, 26 N. W. 587; *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686; *Minneapolis, St. P. & S. St. M. R. Co. v. Chisholm*, 55 Minn. 374, 57 N. W. 63; *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Old Second Nat. Bank v. Alpena County Sav. Bank*, 115 Mich. 548, 73 N. W. 809.

Assignee of contract must be served with notice of cancelation. *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036; *Malmgren v. Phinney*, 50 Minn. 457, 18 L.R.A. 753, 52 N. W. 915; *Davis v. Milligan*, 88 Ala. 523, 6 So. 908; *Irish v. Sharp*, 89 Ill. 261.

Vendee in possession may acquire outstanding title against the ven-

dor. *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800; *Ragsdale v. Phelps*, 90 Mo. 346, 2 S. W. 300; *Seeberger v. Weinberg*, 151 Ill. 369, 37 N. E. 1033; *Sprague v. Martin*, 29 Minn. 226, 13 N. W. 34; *Streeter v. First Nat. Bank*, 53 Iowa, 177, 4 N. W. 915; *Gilbert v. Husman*, 76 Iowa, 241, 41 N. W. 3; *Schroeder v. Bauer*, 140 Ill. 135, 29 N. E. 560.

FISK, J. This is an action in equity, and comes here for trial *de novo*. The facts are not seriously in dispute; but counsel disagree as to the nature of the action, plaintiff's counsel contending that it is an action to quiet plaintiff's title as against the two defendants, while defendants' counsel assert that the action is one to set aside a contract and to vacate certain foreclosure proceedings, including a sheriff's deed based thereon, and to adjudge that any title acquired by defendant Corey through such foreclosure proceedings, and that any interest in the real property in controversy acquired by defendant Gehring through his purchase from Corey, be deemed to be held in trust for plaintiff. We fail to see how such question is very material to a correct disposition of the case. As before stated, the facts are not seriously in dispute, and the parties are entitled to such relief as, under the pleadings and the rules of equity, the facts demand.

Briefly stated the complaint alleges:

1. That, at all times mentioned in the complaint, plaintiff was, and still is, the owner in fee of the northeast quarter (N. E.  $\frac{1}{4}$ ) of section nineteen (19) in township one hundred fifty-nine (159), north of range seventy-nine (79) west. That on October 24, 1905, she entered into a contract with defendant Corey, by the terms of which she agreed to sell to Corey, and the latter agreed to purchase, such real property for a certain stipulated consideration. A portion of such consideration was the assumption by Corey of a \$500 mortgage on the land and interest at 10 per cent, executed and delivered by plaintiff to Nathan M. Barnes.

2. That Corey made default in the payment of the interest thereon, and that the said Barnes foreclosed the mortgage given to secure a portion of such interest, and at such foreclosure sale Barnes became the purchaser, and subsequently assigned the sheriff's certificate to Corey, to whom a sheriff's deed was issued for said property and recorded on April 1, 1908.

3. That in July, 1906, Corey, without the knowledge or consent of



plaintiff, entered into a contract for the sale of said land to defendant Gehring, which contract was filed for record October 31, 1906.

4. That any interest that defendant Corey may have assigned to Gehring is held in trust by the latter, for the benefit of the plaintiff, and,

5. That Corey having made a default in the terms of his contract with plaintiff for the purchase of said real property, plaintiff caused notice of said default to be served on him, and thereafter commenced an action against said Corey for the cancelation of the contract, in which action said defendant made default, and that, by reason of such facts, plaintiff is entitled to a judgment canceling said contract of sale.

The prayer for judgment is "that defendant Corey be declared to have forfeited his interest in such contract, and that the same be annulled, and that he be declared trustee for this plaintiff in such title to said land as he may have acquired by said foreclosure, and for such further relief as to the court may seem just in the premises."

An answer amounting to a general denial was interposed in behalf of both defendants, and subsequently defendant Gehring interposed a separate and amended answer, wherein he alleged, among other things, his purchase on July 26, 1906, of the premises from Corey under contract for a deed, under which contract he was immediately put in possession by Corey, who theretofore had actual possession thereof, ever since which time he, Gehring, has been in actual occupancy of such real property, and that he paid a large sum to said Corey as purchase price, all with plaintiff's implied knowledge and consent. And he offers to do equity by paying to plaintiff all sums due her under her said contract with Corey. The answer then alleges that the notice of the cancelation of the contract between plaintiff and Corey was not served upon him, nor was knowledge thereof, or of the action against Corey to terminate such contract, brought to his notice. Also that Corey is insolvent and unable to respond to him in damages for breach of contract, and that he will consequently suffer irreparable injury in case plaintiff is permitted to enforce such alleged forfeiture of the Corey contract as against him. Then follows allegations as to his good faith in dealing with Corey in the belief that he was the owner and entitled to sell such premises, and he prays judgment that plaintiff's complaint be dismissed, and that he be permitted to redeem such premises from plaintiff by paying to her such sum as may be found due to her under the Corey con-

tract. The foregoing presents substantially the issues framed by the pleadings.

The testimony, in the main, supports the allegations in said answer, and it will not be necessary to review the same at length in this opinion. Such portions only as have a material bearing on what we deem the controlling questions in the case will be referred to.

The contract between plaintiff and Corey contains an express stipulation that the latter shall not assign the same without the written consent of the plaintiff. Such contract also contains the usual provisions giving the vendor the right to forfeit and terminate the same in case of the vendee's default, by giving thirty days' written notice to the vendee of the vendor's intention so to do. Such provision, however, stipulates that the notice aforesaid shall set forth the amount due upon said contract and the time and place when and where payment can be made by Corey. The notice given did not comply with the latter provisions. The testimony discloses that about November 18, 1907, and again about December 20th of said year, Gehring, by letters, informed plaintiff of his claim of ownership of the land, and signified his intention and desire to make good Corey's default under the contract. Plaintiff admits the receipt of such letters, yet it appears that in the following February she caused notice aforesaid to be served on Corey, and thereafter she instituted and prosecuted an action against him alone, to obtain a judicial forfeiture of his said contract, without in any manner apprising defendant Gehring of such proceedings, regarding which she knew he was most vitally concerned. Whether she owed any legal duty to thus apprise him we shall presently consider. She now seeks by this action to obtain from a court of equity a judgment, in effect, readjudicating, as against Corey, what had formerly been adjudicated in the prior action, *viz*: That he, Corey, "be declared to have forfeited his interest in said contract, and the same be annulled," and also that said Corey be declared a trustee for plaintiff of such title as he may have acquired through the foreclosure aforesaid. No specific relief is prayed for as against defendant Gehring, but, as before stated, the latter answered, setting up his equities in such land through his purchase from Corey, and prays to be permitted to redeem by paying plaintiff all sums due her. Whether, technically speaking, the action is one to quiet title, as asserted by appellant, or is one to set aside a contract, and to vacate certain foreclosure proceedings, and to adjudge that Corey is a trustee

for the plaintiff of any title acquired by him through such foreclosure, is, as we view it, not in any way controlling. Obviously, plaintiff is seeking equitable relief, and the ultimate purpose of the action is to cut off or foreclose any interest asserted by defendants in this land. In other words, she invokes the equity powers of the court to aid her in making effectual an alleged forfeiture.

This trial court upheld defendant Gehring's right to redeem as prayed for by him, and we are asked on this appeal to reverse this holding. We are agreed that under all the facts plaintiff has no tenable ground for complaint, and that her contentions are devoid of equity. It would certainly be grossly inequitable to deprive Gehring of the right to redeem under such facts. The undisputed testimony discloses that Gehring had been in the actual possession of the premises ever since his purchase from Corey, in July, 1906, and that plaintiff acquired actual knowledge of his said purchase in November of that year. While the contest between her and Corey contains a stipulation that the same should not be assignable without her written consent, such provision was solely for her benefit, and might be waived by her, and we think such waiver may be fairly implied from the facts. It has been held that, at most, such stipulation is merely "collateral to the main purpose of the contract, designed as a means of securing and enforcing performance of what was undertaken by the vendee, to wit, the prompt payment of the purchase money." *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14. It was held in the above case that there is nothing personal in the nature of such a contract, and the fact that an assignment of the contract has been made by the vendee in violation of such a stipulation is no defense to an action by the assignee of the contract, to compel a conveyance by the vendor, where the latter has received the purchase money. See also *Poehler v. Reese*, 78 Minn. 71, 80 N. W. 847. Good faith and fair dealing toward Gehring under the facts would seem, on the plainest principles of equity, to require that notice of plaintiff's intention to declare a forfeiture of the contract should have been brought to Gehring's attention. But we do not need to rest our decision on the above grounds alone. Sections 7494 and 7495, Rev. Code 1905, provide how such contracts may be declared forfeited. Under these sections written notice is required to be given "to the vendee or purchaser, or his assigns," and we think the legislature clearly intended by the above language to require written notice

of such intention to be served on all persons known by the vendor to have acquired by purchase or otherwise the vendee's interest in the property. A similar statute exists in Minnesota, and the supreme court of that state, in *Hage v. Benner*, 111 Minn. 365, 127 N. W. 3, while not expressly so holding, uses language tending to support our views as above expressed. The court says:

"The further contention of defendant that the notice was erroneously served upon Scott cannot be sustained. Scott was the vendee named in the contract, and plaintiff had the undoubted right to treat him as the real party in interest, until informed to the contrary. While Scott assigned the contract to defendant prior to the notice of cancelation, it does not appear that plaintiff had either actual or constructive notice of the same. The assignment was not personally called to his attention, and it was not recorded until after the notice was served upon Scott."

The word "assigns," as used in our statute, should be given its broad meaning, and not restricted to mere assignees of the written contract. As supporting this construction, see *Brown v. Crookston Agri. Asso.* 34 Minn. 545, 26 N. W. 907. See also 1 Words and Phrases under the title "Assigns," and cases cited. In *Shelly v. Mikkelson*, 5 N. D. 22, 63 N. W. 210, this court gave to the word "assigns" a like significance. It was there said by Wallin, Ch. J.: "The obligation bound the vendee to accept a deed either from the plaintiff or his 'assigns,' as it might happen; in such a contract, the word 'assigns' must be construed to mean 'grantee.'" See also *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694.

We conclude, therefore, that in order to declare a forfeiture of such a contract as against Gehring, service of notice, under the facts, should have been made on him. This not having been done, he is entitled to the relief prayed for by him, and on the filing of the remittitur, the District Court will enter a new judgment accordingly, but giving defendant sixty instead of thirty days in which to redeem. Respondent to recover his costs on this appeal.

MORGAN, Ch. J., not participating; Goss, J., being disqualified, took no part in the decision, Hon. A. G. BURR, of the Ninth Judicial District, sitting in his place by request.

**THE STATE OF NORTH DAKOTA EX REL. I. A. JOHNSON,** as Relator and One of the Trustees and Officers of the Village of North Minot, a Corporation, Organized and Existing under the Laws of the State of North Dakota, and I. A. Johnson, as a Resident and Property Owner and Taxpayer of Said Corporation, and as a Property Owner and Taxpayer of Harrison Township, a Corporation, Organized and Existing under the Laws of the State of North Dakota, v. **SAM H. CLARK,** Mayor of the City of Minot, Lisle Thompson, Auditor of the City of Minot, R. H. Emerson, N. Davis, P. S. Anderson, H. A. Hurd, T. J. McLaughlin, E. D. Kelly, J. B. Reed, J. H. Scofield, A. LeSueur, Nicholas Hendrickson, P. Vandenoever, and Fred Spath, Aldermen of the City of Minot, and the City of Minot, a Corporation, Organized and Existing under the Laws of the State of North Dakota.

(131 N. W. 715.)

**Municipal Corporations — Village Incorporation — Jurisdiction.**

1. The date of the filing with the board of county commissioners of a petition for village incorporation, and not the date of the petition itself, gives such board jurisdiction to act.

**Municipal Corporations — Annexation of Territory — Conflicting Jurisdiction.**

2. Power being given over the same territory to two bodies authorized to act, exclusive jurisdiction vests in the party first acting under the power; hence the city council of Minot, having secured jurisdiction March 18, 1909, had exclusive jurisdiction as against the board of county commissioners, to whom

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**Note.**—The question of the purpose and scope of a writ of certiorari is the subject of a note in 40 Am. St. Rep. 30, and, as shown by the authorities there considered, when there is a new or summary jurisdiction created, the proceedings so authorized, whether in a court or not, if of a judicial or quasi judicial character, and not subject to review by writ of error nor by appeal, may be removed to and reviewed by a superior court, by virtue of the writ of certiorari. And that certiorari will lie in some cases, even where there is a remedy by appeal, is shown by a note in 50 L.R.A. 787, though it is difficult to lay down a fixed rule as to when the writ will be awarded in a case where an appeal is provided. This difficulty is exemplified by the two cases to which the note is appended, in one of which the writ was granted, and in the other refused. These two cases were decided by the same court and by a divided court in each instance, and in one case with an interdivision of the concurring judges.

a petition was presented for a village incorporation April 7, 1909, by the citizens of North Minot.

**Municipal Corporations — Annexation of Territory — Nature.**

3. The legislature having designated the method of giving notice of the proceedings of the city council with reference to resolutions extending their boundaries, such method cannot be enlarged or diminished by any act or resolution of the city council. Accordingly, *held*, that the notice published and posted in this case complied with the statute, and gave the city council jurisdiction to act.

**Municipal Corporations — Powers of Council — Legislative Function.**

4. A city council, in passing resolutions and proceeding to add outlying territory to the limits of the city, calls into motion the exercise of a legislative function.

**Certiorari — Grounds — Officers — Review.**

5. Under the statute of this state, § 7810, Rev. Codes 1905, a writ of certiorari is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

**Certiorari — Other Remedy — Quo Warranto.**

6. Considering the necessities of the people affected by the orders in this proceeding, without deciding whether the matters could be determined by an action in the nature of quo warranto, it is not certain that that remedy would be speedy and adequate. In such cases the writ should be granted.

**Certiorari — Words and Phrases — "Beneficially Interested."**

7. A citizen and a taxpayer of the territory known as North Minot is a party beneficially interested, under the provisions of § 7811, Rev. Codes 1905, which requires that "the application must be made and filed by the party beneficially interested," following the rule laid down in *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 40, 49 N. W. 164. Hence this proceeding was properly brought by and entitled in the name of, the State ex rel. I. A. Johnson, who was a citizen, taxpayer, and officer of the village of North Minot.

**Appeal and Error — Review Upon Record Only.**

8. An appellate tribunal cannot go outside of the record as settled by the lower court, and be guided by statements of counsel in his brief, which have not been incorporated into and made a part of the record by such lower court.

Opinion filed May 2, 1911.

Appeal from District Court, Ward county; *Goss*, Judge.

Application by the state, on the relation of I. A. Johnson, as relator and one of the trustees and officers of the village of North Minot,

and as a resident and property owner and taxpayer of said corporation, and as a property owner and taxpayer of Harrison township, against Sam H. Clark, mayor of the city of Minot, and others, and the city of Minot, for writ of certiorari. From an order and judgment setting aside an action of the city council of Minot in attaching certain territory, defendants appeal.

Reversed and petition dismissed.

*R. H. Bosard* and *G. W. Twiford*, for appellants.

*James Johnson*, for respondent.

POLLOCK, Special J. The matters in controversy in this proceeding were instituted in the lower court by the issuance of a writ of certiorari. The record discloses the following facts:

On the 18th day of March, 1909, the city council of the city of Minot, North Dakota, passed a certain resolution extending the limits of said city to include what is now known as North Minot. In said resolution, among other things, we find the following:

"Whereas, the city of Minot is a city incorporated under the general laws of the state of North Dakota, and has more than 5,000 inhabitants, and

"Whereas, the present territory included in the city limits thereof contains 2,000 acres; and

"Whereas, there is adjacent to said city of Minot a tract of land containing about 200 acres, of which more than two thirds has been heretofore platted into lots and blocks;

"Now, therefore, be it resolved by the city council of the city of Minot, that the boundaries of said city of Minot, North Dakota, be extended so as to include and incorporate within the city limits of the city of Minot the following described land, and the boundaries of which territory proposed to be incorporated are as follows."

Then follows a description of the property. And it was further resolved:

"That this resolution be published in the Ward County Independent, the official paper of the city of Minot, once each week for two successive weeks."

The record shows that this resolution was passed and adopted on the 18th day of March, 1909, signed by Sam H. Clark, Mayor, and duly attested by George L. Morrow, City Auditor.

The validity of this order and the proceedings had thereunder are now before the court for review.

The record further shows that the resolution above referred to was published in the official paper of said city of Minot, on the 18th and 25th days of March, but at that time no notices were posted. Apparently from examination of the law and the acts of the defendants, there was some controversy as to whether the notices should have been published two or three times. In any event, the resolution was again published in the official paper of said city, in every copy of each issue of said newspaper, for a period of three consecutive weeks, to wit: April 15th, 22d and 29th, 1909.

The record further shows that on the 10th day of April, 1909, there was posted in five public places in the city of Minot a typewritten copy of the above resolution.

On the 3d day of April, 1909, there was filed with the city council a remonstrance from residents and property owners residing upon the property described in said resolution of March 18th. This remonstrance was signed by forty-two persons residing within the limits of the territory sought to be annexed. Whereupon the city council fixed Monday, April 12th, at 8 o'clock P. M., as a time for hearing the parties who desired to protest. At said hearing it was discovered that the resolution had only been published twice, and the mayor informed the citizens of North Minot and Harrison township, who were protesting, that no further proceedings would be had at that time, and that they would be notified when further action would be had. That thereafter the three publications, on April 15th, 22d and 29th, took place, and the notices were posted as aforesaid on April 10th. Whereupon another protest was filed by the parties in interest, and they were cited to appear before the city council on May 18th, 1909, at which time the citizens of North Minot and Harrison township, being property owners of the land described in said resolution, appeared before said city council, and an adjournment was again had until May 21st, at which time another adjournment took place till May 28th, when the objection of the taxpayers and protestants to said annexation was heard before said city council.

Among other things, the following objections were noted: That, on April 7th, 1909, a petition which was dated March 5, 1909, was presented to the board of county commissioners of Ward county, by



more than one-third of the legal voters residing within the territory known as North Minot, for the incorporation of said territory into a village to be known as North Minot, and that, on April 9th, 1909, such proceedings were had by the said board of county commissioners, having had the same under consideration, which finally resulted in an election being held in said North Minot on April 17th, to permit the qualified electors to vote upon the question of incorporation; and that at such election forty-five ballots were cast, forty-three thereof being in favor of, and two against, such incorporation. That, at a meeting of the said board of County Commissioners on April 27th, 1909, they passed a resolution in which they referred to the petition filed April 7th and the proceedings had thereunder, the election and the result thereof, and made a final order as follows:

"Therefore, the board of county commissioners of Ward county does hereby declare and order that the said territory has been and it is incorporated as a village by the name of North Minot."

At the several hearings had before the city council of Minot the protestants appeared, objected to the proceedings, and filed their exceptions to the rulings made by the city council. The final order of the city council of Minot was made by a resolution which was dated May 29th, 1909, in which it was resolved, among other things:

"That the limits of said city of Minot be, and the same are hereby extended as follows: (Here follows a description of the property.) And that said territory hereinbefore described, and the whole thereof, is a part of the city of Minot, and within the corporate limits thereof."

Same was passed and adopted by eight aldermen present, there being absent and not voting four. It will thus be seen that the original action of the city council was dated March 18th, while the final order therein was not made until May 29th; that the original application to the board of county commissioners upon the part of the people of North Minot, to be incorporated as a village, was filed April 7th, and the final order therein by the said board, making it a village, was made April 27th, 1909.

The defendants claim to have proceeded under the provisions of article 20, page 582, of the Political Code, beginning at § 2822, Rev. Code, 1905, as amended by senate bill No. 220, being chapter 58, page 49, Laws of 1909, which, in substance, under § 2825, permits,

"Any city of this state, whether organized under the general law or

under a special charter, and without regard of the number of its inhabitants, may so extend its boundaries as to increase the territory within the corporate limits not to exceed one half of its present area, by a resolution of the city council passed by two thirds of the entire members-elect, particularly describing the land proposed to be incorporated within the city limits setting forth the boundaries of the territory proposed to be incorporated, . . . may be so incorporated within such limits by the passage of a resolution, as is herein before provided, for the extension of limits.

Section 2826 provides, in substance, that the resolution of the city council shall be published in the official newspaper of the city twice, once in each week's issue for two successive weeks, and printed or typewritten copies of such resolution shall also be posted in five of the most conspicuous places within the territory proposed to be annexed, etc. The same section provides for protests and the hearings to be had thereon, personal inspection by the city council, and provides in substance that if, in their opinion, such territory ought to be annexed, they may so annex it by the passing of the resolution above referred to,

The objections made by the plaintiff to the proceedings are, in substance, that the council acted without jurisdiction because of a failure to properly publish and post the notices, as required by law, insisting that there should be three publications, and further claiming that only two publications having been made in the first instance, and that no notices having been published prior to April 10th, thereby the city council lost jurisdiction and all their acts thereafter were void; and, second, because, even if the notices were given properly, the village of North Minot was officially organized by the board of county commissioners by virtue of the order of said board dated April 27th, which was made about a month prior to the final order of the city council of Minot, which occurred May 29th. It is likewise contended by counsel for the plaintiff that the date of the petition (March 5th, 1909), and not the date of the filing thereof with the county auditor (April 7th, 1909), is what gave that board jurisdiction, and he claims, therefore, that the resolution of the city of Minot being dated March 18th, 1909, if it gave the said city and jurisdiction whatever, was later in point of time than the jurisdiction which was secured by the board of county commissioners, with reference to the petition filed with them.

Certain other questions arise upon this record, among which are those relating to the procedure and the power of this court to grant writs of certiorari in cases like the one at bar.

A decision upon the following eight questions involved, it appears to us, will settle the entire controversy.

## I.

We are of the unanimous opinion that the date of the petition of the citizens of North Minot could not in any manner be considered as a point of time when the jurisdiction of the board of county commissioners would begin, even if it did begin; but, rather, all the authorities agree that the jurisdiction to act in any matter similar to this takes place at the time of the filing of the petition, which, in this instance, was April 7th, 1909. We therefore hold that the jurisdiction of the city council of Minot, having been invoked on March 18th, 1909, preceded that of the board of county commissioners.

## II.

In view of the fact that the city council obtained jurisdiction March 18th, 1909, could they be ousted of that jurisdiction by the operation of any other board or tribunal, and does the fact that the final order of the board of county commissioners was made prior to that of the city council in any manner affect the proceedings of such city council? It would be an anomalous situation, indeed, if co-ordinate bodies exercising governmental powers could operate upon the same subject-matter at one and the same time, and thus enter upon a race to accomplish an object similar to that permitted by the legislation in this instance. The legislature of the state has undoubted power to organize the people within the state into cities and villages, Section 130 of the Constitution provides: "The legislative assembly shall provide by general law for the organization of municipal corporations." It has been deemed wise to provide, under certain conditions, that villages may be incorporated by order of the board of county commissioners, and likewise that larger numbers of people may become organized into cities under a general incorporating act. It often happens that there are many people living upon the outskirts of these

larger cities thus organized, who are in a large way securing the benefits of the growth and development of such cities, and we must assume that the legislature, in passing the act in question with reference to enlarging the limits of such cities, had due regard to the general benefit to be derived to all the people, both in and out of the city, by virtue of such enlargement. Confusion could only result from permitting two bodies to proceed in the formation of such corporation. Every possible reason suggests the propriety of permitting that body which first secures jurisdiction, to proceed in determining the questions involved. The act in question provides for a full hearing, and at every step, as shown by the record, the people of North Minot were present before the city council, giving evidence and participating in the proceedings had before that body. Courts frequently have co-ordinate jurisdiction over certain controversies, and it is always held in such cases that the court first securing jurisdiction retains it, to the exclusion of any other court throughout the entire litigation. The safety of litigants demands this, and the same principle is involved where the organization of cities or villages is concerned. As stated by Osborn, Justice, in *Taylor v. Ft. Wayne*, 47 Ind. 280:

"The exercise of the powers conferred upon the trustees of towns incorporated under the act in question would be inconsistent with the exercise of those conferred upon cities under the act authorizing their organization within the same territory at the same time. That is so glaring and manifest that an enumeration and comparison of the powers and duties of the two sets of officers are unnecessary. 'There cannot be two corporations for the same purposes, with coextensive powers of government extending over the same district.' . . . 'There cannot be two such effective corporations in the same place; for, instead of good order, that would only be productive of anarchy.' . . . 'There cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges.' . . . The proposition that two independent governments cannot exercise the same powers, within the same district, at the same time, is a self-evident one." See *People ex rel. Hathorne, v. Morrow*, 181 Ill. 315, 54 N. E. 839; *Independent Dist. v. Sioux County*, 51 Iowa, 658, 2 N. W. 591.

"It is a clear [and settled] principle of jurisprudence that when there exists two tribunals possessing concurrent and complete juris-

diction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted, and which thus acquires jurisdiction of the subject." *Taylor v. Ft. Wayne*, supra.

We therefore, hold that the city council of Minot, having first acquired jurisdiction, secured also the duty to retain it and proceed to a final hearing and disposition of the application as prescribed by law.

### III.

Did the city council of Minot lose the jurisdiction which it secured March 18th by the manner of the publication and posting of the notices? Counsel for the plaintiff has insisted all the time that it did. He suggests that the protestants called the attention of the city council to this error. He asserts, in substance, that, having published the notice on March 18th and 25th, and having failed to post the notices at that time, by reason of this, the city council lost jurisdiction. We are unable to agree with counsel in this contention. As well might you say that the power of sale in a mortgage became void if the mortgagee, in attempting to foreclose it by advertisement, finding that there was an error in the publication, abandoned the first publication, and proceeded to and did republish the notice in full compliance with law. The record in this case shows that the notice was published not only the two times mentioned, but likewise upon April 15th, 22d, and 29th, and that the notices required by law were posted on the 10th day of April, 1909.

Somewhat of stress is laid upon the fact that the notices were not published according to the requirement of the council in the resolution. That is wholly immaterial. That part of the resolution was simply surplusage. The city council had no power to either enlarge or limit the notice required by the statute. The statute itself defines how the notice of the resolution shall be printed and posted, and the record in this case shows a full compliance with the requirements of the statute. It is not claimed by the plaintiffs in this action that they did not have notice. Indeed, the record shows that they not only were informed of all the proceedings, but were constantly present, and protesting against them; so that, viewed from every standpoint, both legal and equitable, no claim can be urged as against the proceedings in

this particular. It is not contended that the legislature did not have power to annex the territory under the provisions of this act, and the only question before us is whether or not the city council and those acting for it strictly complied with the terms of the statute.

#### IV.

The next question which arises fairly upon this record is whether the acts of the legislature were administrative, legislative, or judicial in their nature. A settlement of this question is only important in view of the fact that it is contended that the writ of certiorari does not properly lie to review this proceeding. We are of the unanimous opinion that this question has been settled by a previous adjudication of this court. In *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023, where the court had under examination, a question involving the corporate limits of a city, Judge Morgan, in speaking for the court, among other things, stated:

"It is a fundamental principle of law, and recognized by § 130 of the Constitution of this state, that the creation of municipal corporations is a legislative function. Such corporations are created pursuant to legislative enactments only. . . . This proceeding contemplates a change in such corporate limits. Such change of corporate limits is effectuated under the application of no different principles than the organization of the corporation originally. . . . The welfare of the inhabitants should be consulted in each instance. . . . This seems to us to involve the exercise of what is clearly legislative discretion. . . . If the boundaries of municipal corporations can be altered and changed by the legislature in its discretion,—and the authorities are all that way,—then it is impossible that the courts can be invested with such power. . . . Furthermore, the provision authorizing the court to enlarge or diminish the boundaries of the village, as justice may require, seems to be as equally an exercise of legislative power."

From these quotations it is manifestly clear that a city council, in extending their boundary limits, call into play the exercise of a legislative function.

## V.

We are now confronted with the question whether the writ of certiorari may be invoked to review the legislative acts of the city council of Minot. It is contended by counsel for the defendants that the writ, under our statute, cannot have so wide a scope, but, rather, can only be used in cases where the act under consideration is of a judicial or quasi judicial nature. The precise scope of the writ of certiorari has never been settled in this state. Section 7810 of the Revised Codes 1905 reads as follows:

"A writ of certiorari may be granted by the supreme and district courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy."

It would be interesting to discuss at length the history and development of the writ of certiorari, both at common law and under the statutes of the several states. Such dissertation, however, would be largely academic, in view of the language of our statute. Carried forward, as it was from the territorial Code, North and South Dakota enjoy the distinction of having a writ peculiarly their own.

In the general discussion of the question, there are those, like Judge Mitchell of Minnesota, when speaking for the court in the case of *Moode v. Stearns County*, 43 Minn. 312, 45 N. W. 435, who believe the writ should not be extended to the examination of the acts of boards and tribunals which are not of a judicial or quasi judicial nature. Such decisions are based upon either the doctrine of the common law or some statute, like California, which limits the inquiry to acts when the inferior tribunal, board, or officer is in the exercise of judicial functions. The California statute, paragraph 1068 (3 Kerr's Cyc. Codes, Cal. page 1574), reads as follows:

"A writ of review may be granted by any court except a police or justice's court, when an inferior tribunal, board, or officer *exercising judicial functions* (the italics are ours) has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

Our statute, it will be observed, omits the words "exercising judicial functions," and seems to have been prepared in the light of the well-known difference in the adjudications of the several courts upon this

very question. In view of this difference and the express language of our statute, we hold that the district and supreme courts have power to examine into acts of such tribunals as are exercising administrative legislative, judicial, and other functions, for the sole purpose of ascertaining whether they have proceeded according to law. We do not wish to be understood as saying that under this writ the courts have power to invade and control the discretionary authority of such boards and tribunals when proceeding legally, "nor that the district court shall become an asylum for all matters growing out of meetings of such tribunals." The questions for consideration are simply these: Have they jurisdiction, and have they proceeded according to law in the exercise thereof? If they have, then it matters not whether the act complained of is judicial, administrative, or legislative. As to the wisdom of their conclusions thus legally given in this proceeding, we can have nothing to say.

We agree with the interpretation of this statute made by the supreme court of South Dakota in *State ex rel. Dollard v. Hughes County*, 1 S. D. 292, 10 L.R.A. 588, 46 N. W. 1127, and we quote with approval the language of Judge Kellam found under paragraph 3, 299, of 1 S. D., as follows.

"There is little room for doubt or discussion as to the office of a writ of certiorari at common law, and in many of the states the writ is left as at common law, unaffected by statutory regulations. In other states, the legislature has adopted rules of practice for its issuance and hearing, without materially affecting the reach or scope of the writ, but our statute, inherited from the territory of Dakota, is *sui generis*. It is not only unlike the common law, but equally unlike the law of any other state, so far as we have had the means of pursuing the inquiry. Gathering its meaning and intent from its language, the office of the writ which it authorizes is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where, in the language of such statute, inferior courts, officers, boards, or tribunals have exceeded their jurisdiction; and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, subject only to the further limitation of § 5513 that 'the review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board, or officer has regularly pursued the authority of such court, tribunal, board, or officer.' Thus



the legislature, whether wisely or unwisely, it is not within the province of this court to inquire, has, in plain and unequivocal terms, extended the scope of the writ in this state so that it fairly brings before us the record of these proceedings, whether judicial or otherwise."

## VI.

Again, it is claimed that there is another remedy which might have been adopted, by an action in the nature of quo warranto, and that the same would afford all proper relief. Herein large discretion of the court must be invoked. As a result of the acts of the city council of Minot, should the same be declared legal, large quantities of property must be added to the tax roll of said city. Various other matters of adjustment must be considered, and it is absolutely necessary, for the safeguarding of the interests of all persons concerned, that the most speedy remedy known to the law should be invoked. In this case, without determining whether an action in quo warranto would be proper, it is not certain that that remedy would have been speedy and adequate. Where such a condition arises, the better authority is that the writ should be granted, and especially where it is alleged that the tribunal below is acting without jurisdiction. 6 Cyc. 745. The special claim in this proceeding on the part of the plaintiff is that the city council did not have jurisdiction to act by reason of the failure to properly post and print notices. This is purely a question of law, and one which attacks directly the jurisdiction of the council, and we believe that it is a proper question to be reviewed by this writ.

## VII.

It is likewise claimed that the relator, I. A. Johnson, is not a party beneficially interested, and that the proceeding should have been instituted by the attorney general or with his consent, Statute 7811, our Code, says: "The application must be made and filed by the party beneficially interested." The record shows that I. A. Johnson is an officer, a citizen and taxpayer of the territory under the resolution added to the city of Minot. We understand that the rule announced by some courts is that a party beneficially interested is one whose interest must be of a nature which is distinctive from that of the mass

of the community. *Ashe v. Colusa County*, 71 Cal. 236, 16 Pac. 783; but we believe that question has been settled by a former adjudication of this court. In the case of *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 40, 49 N. W. 165, Judge Wallin, speaking for the court and discussing the questions here involved, says:

"We think it will be proper to add, with a view to settling a very embarrassing and much controverted question of practice, that in cases where the state, as such, is directly interested as a party, the attorney general should apply for the writ, or in some manner signify his assent to the proceeding; but, on the other hand, where the controversy does not concern the state, as such, but does concern a large class of citizens in common, as, for example, the citizens and taxpayers of a particular county, town, city, or district, the required affidavit may properly be made by any citizen of the locality affected. In the class of cases last referred to, any citizen of the locality affected is, in our opinion, 'beneficially interested,' within the meaning of § 5518, Comp. Laws 1887. It follows that, in this class of cases, the writ may be invoked by any citizen without the concurrence of any officer."

Section 5518 of the Compiled Laws there referred to has reference to a writ of mandamus, but the principle involved is exactly the same when considering the language of the statute, as it applies to the writ of certiorari.

We hold, therefore, that I. A. Johnson was a party beneficially interested, and that the title of the action was proper.

## VIII.

Counsel for the plaintiff, on page 2 of his brief, uses the following language:

"We also wish to call the court's attention to the fact that the abstract which had been prepared by the city of Minot was done without any acquiescence on the part of the people of the village of North Minot, or anyone representing them; and, inasmuch as this abstract does not, in our mind, represent the matters as they transpired from time to time, we beg leave to make a short statement in our brief as to when, at what places and times, the different transactions which are to be reviewed took place."

In response to this suggestion and the statements thereafter made

in the brief, we can only say that this court must necessarily be confined to the record as made and settled by the court below. Outside discussion of what might or might not have happened cannot be considered. The record in this case speaks for itself, and by that the parties and this court must be controlled.

From the foregoing, it follows that the action of the District Court must be reversed, the petition dismissed, and the writ quashed; the defendants to have their costs.

It is so ordered.

MORGAN, Ch. J., not participating, and Goss, J., disqualified. Goss, J., having tried the case below, did not sit in the case in this court, and took no part in the decision, HON. CHAS. A. POLLOCK, Judge of the Third Judicial District, sitting in his stead.

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GEORGE SOMMERS v. C. M. WAGNER, M. E. Wagner, Foley  
Brothers & Kelly, a Corporation.

(131 N. W. 797.)

**Mortgage — Covenants — Assignment of Mortgage to Mortgagor — Payment.**

1. M. E. Wagner executed and delivered defendant corporation a warranty deed; in the covenant against encumbrances therein was the covenant "that the same are free from all encumbrances except a mortgage given to McWilliams for \$400," with the other usual covenants of general warranty. Defendants Wagner were mortgagors in said mortgage, and, after said deed had been recorded, they paid McWilliams the amount of the mortgage, and took from him an assignment thereof, which, with the mortgage note past due, they delivered to plaintiff, who had both actual and constructive notice of the corporation's rights under its deed.

*Held*, that the grantee in the deed did not purchase the land subject to said mortgage, but under the covenant of general warranty in the deed, the grantor's liability to pay the mortgage continued, and the law presumes that the assignment was taken as a fulfillment of their duty to defend the title by them conveyed, and the assignment operated as an immediate satisfaction of the mortgage, and that the plaintiff by the assignment from the Wagners did not obtain a lien by mortgage upon said premises, nor revive thereby the mortgage discharged by such payment.

Opinion filed May 6, 1911. Rehearing denied May 29, 1911.

Appeal from District Court, Rolette county; *Cowan*, Judge.

Action by George Sommers against C. M. Wagner and others. From a judgment for plaintiff, defendants appeal.

Reversed, and action dismissed.

*Fred E. Harris, Harris Richardson, and H. C. Kerr*, for appellants.

Exception against encumbrances does not except against covenants of warranty. *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827; *Howells v. Richards*, 11 East, 633, 11 Revised Rep. 287; *Estabrook v. Smith*, 6 Gray, 572, 66 Am. Dec. 445; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Welbon v. Welbon*, 109 Mich. 356, 67 N. W. 338; *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399; *Weeks v. Grace*, 194 Mass. 296, 9 L.R.A.(N.S.) 1092, 80 N. E. 220, 10 A. & E. Ann. Cas. 1077; *Bennett v. Keehn*, 67 Wis. 154, 30 N. W. 112; *Duvall v. Craig*, 2 Wheat. 45, 4 L. ed. 180; *King v. Kilbride*, 58 Conn. 109, 19 Atl. 520; *Rowe v. Heath*, 23 Tex. 614.

Where mortgagor acquires his own mortgage, the assignment thereof inures to the benefit of his covenantees. *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827; *Merritt v. Byers*, 46 Minn. 74, 48 N. W. 417; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Townsend*, 18 N. Y. 575; *Jones, Mortg.* 6th ed. § 864; *Wadsworth v. Williams*, 100 Mass. 126.

Payment of mortgage by one bound to pay discharges it. *Mickles v. Townsend*, 18 N. Y. 575; *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; 20 Am. & Eng. Enc. Law, 2d ed. 1060; *Brown v. Lapham*, 3 Cush. 551; *Putnam v. Collamore*, 120 Mass. 454; *Frey v. Vanderhoof*, 15 Wis. 398; *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; *Burnham v. Dorr*, 72 Me. 198; *Clay v. Banks*, 71 Ga. 363; *Butler v. Seward*, 10 Allen, 466; *Comstock v. Smith*, 13 Pick. 119, 23 Am. Dec. 670; *Trull v. Eastman*, 3 Met. 124, 37 Am. Dec. 126; *McCabe v. Swap*, 14 Allen, 188; *Carlton v. Jackson*, 121 Mass. 592; *Kneeland v. Moore*, 138 Mass. 198; *Northwestern Nat. Bank v. Stone*, 97 Iowa, 183, 66 N. W. 91; *Dollar Sav. Bank v. Burns*, 87 Pa. 491; *Converse v. Cook*, 8 Vt. 164; *Zimpleman v. Veeder*, 98 Ill. 613.

Covenants in a mortgage are of the same effect as those in a deed. *Butler v. Seward*, 10 Allen, 466; *Jones, Mortg.* 6th ed. § 864; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Yerkes v. Hadley*, 5 Dak. 324, 2 L.R.A. 363, 40 N. W. 340; *Iowa Loan & T. Co. v.*

King, 58 Iowa, 598, 12 N. W. 595; McManness v. Paxson, 37 Fed. 296; Van Rensselaer v. Kearney, 11 How. 297, 13 L. ed. 703.

A mortgage once paid cannot be revived. Luce v. American Mortg. & Invest. Co. 6 Dak. 122, 50 N. W. 621; Mead v. York, 6 N. Y. 449, 57 Am. Dec. 467; Dick v. Moon, 26 Minn. 309, 4 N. W. 39; Thompson v. George, 86 Ky. 311, 5 S. W. 760; Johnson v. Anderson, 30 Ark. 745; Spencer v. Fredendall, 15 Wis. 666; Merrill v. Chase, 3 Allen, 339.

Conveyance with grantee's name blank is void. Rev. Codes 1905, §§ 5039, 4870; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Burns v. Lynde, 6 Allen, 305; Shep. Touch. 54; Hibblewhite v. McMorine, 6 Mees. & W. 200, 9 L. J. Exch. N. S. 217, 4 Jur. 769; 1 Devlin, Deeds, § 456; Lady Superior of Cong. Nunnery v. McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184; Curtis v. Cutler, 37 L.R.A. 737, 22 C. C. A. 16, 40 U. S. App. 233, 76 Fed. 16.

*Le Sueur & Bradford*, for respondent.

Goss, J. This is an appeal from the district court of Rolette county from a judgment for foreclosure of a mortgage entered in favor of plaintiff and against defendants and appellants. Briefly recited, the facts are that C. M. Wagner owned a quarter section of land of the value of at least \$2,000, which he and wife had mortgaged to one McWilliams, securing the payment of \$400, due January 1, 1904, as evidenced by a promissory note executed by Wagner and wife to McWilliams, and which mortgage was duly recorded April 17, 1903, in the office of the register of deeds of said county; that thereafter Wagner transferred the land in question to his wife by quitclaim deed duly recorded. After this, C. M. Wagner, indebted to the amount of \$1,400 to Foley Brothers & Kelly, a corporation, had his wife, Mary E. Wagner, execute and deliver her warranty deed of said land to said corporation as security for the payment of her husband's debt to such corporation; said deed recited a consideration of \$1,200, and was in form a warranty deed, containing all the covenants of warranty, but in its covenant against encumbrances contained the exception "that the same is free from all encumbrances except a mortgage given to McWilliams for \$400." The deed did not provide that the grantee should assume the mortgage encumbrance. This deed was recorded

January 21, 1904. Thereafter, on June 16, 1904, for the purpose of satisfying said mortgage debt, Wagner paid the \$400 mortgage in full, with money given him by his wife of her funds; whereupon the mortgagee, McWilliams, delivered Wagner the \$400 note and a written assignment in blank of the mortgage, which assignment was duly acknowledged. The assignment was supposed by Wagner at the time it was received to have been a satisfaction, and under such supposition, it, with the note, was placed among Wagner's papers, he informing his wife that he had paid and satisfied the mortgage. In January following, an agent of Sommers, plaintiff, demanded of Wagner the payment of \$500 owing by him to Sommers, or that the debt be secured, and during the conversation as to Wagner's ability to pay or secure, plaintiff's agent learned the foregoing facts recited, and was delivered the \$400 note with the assignment of the mortgage still in blank and unrecorded. The agent at the time of the receipt of these papers was informed by Wagner that he had paid the mortgage.

Regarding the reason for the delivery of the assignment and note, the testimony of the agent and of Wagner are in conflict, the former claiming Wagner to have informed him that the reason he did not record the assignment was that the deed from Wagner to the corporation was in fact but a mortgage, and he, Wagner, did not want to satisfy the prior \$400 mortgage, because the corporation had enough security for what he was owing them. Wagner's testimony is that he delivered the assignment and note, that the plaintiff might negotiate with the corporation and have it either take up the note and assignment, paying plaintiff's claim, or otherwise adjust the matter between them, so that the farm would be satisfactory security to both for their claims. In any event, at that time Wagner delivered plaintiff's agent a written order for notes held by defendant corporation as collateral security for the debt for which the warranty deed was also security; and Wagner further gave plaintiff's agent a written order to defendant corporation to assign to plaintiff any equity he might have in the land after payment of his debt to such corporation. Defendant corporation refused to deliver the notes alleged to be held as collateral security, or in any wise to recognize plaintiff's claim to the land, claiming to be the owner in fee of the land. But defendant Wagner denies that he gave the note and assignment mortgage to the plaintiff as collateral security to them, alleging that he, instead, delivered possession of it to them, that

they might negotiate some settlement between them and defendant corporation, with the evident purpose of reserving to himself the right to ratify or disapprove of any such attempted settlement. After the delivery of the assignment and note to plaintiff, the name of George Sommers was, unauthorized by Wagner or his wife, inserted in the assignment, and this action begun for foreclosure of the mortgage as a first mortgage on the land, prior to the claims of defendant corporation and the wife grantee from her husband by quitclaim deed. In the complaint plaintiff pleads the assignment of the \$400 mortgage to him by the mortgagee; that the same is past due, and the usual statutory recitals in foreclosure actions, and asks judgment of foreclosure against such property to collect the debt.

To the complaint of plaintiff, defendants Wagner and wife answered, pleading payment by them of the mortgage attempted to be foreclosed, denying ownership by defendant corporation of the tract, and asking a dismissal of the plaintiff's action, and that the absolute title in fee to the land be adjudged to be in them. To the plaintiff's complaint, defendant corporation answers, claiming to be the owner of the land; reciting the deed to them from Mrs. Wagner, and that said deed warranted title, and that the land was free from all encumbrances excepting the mortgage attempted to be foreclosed, alleging it to have been paid, and asking judgment that the court adjudge and determine the interest and claim of the defendant in and to said land under said deed; that the same be adjudged prior to any claim of the plaintiff and that the mortgage attempted to be foreclosed be discharged of record as paid.

There is little conflict in the testimony. The wife testifies that her husband usually transacted her business for her; that she authorized her husband to pay and satisfy the mortgage, and supposed he had done so, and she at all times claimed the mortgage as paid and satisfied; that the husband never had any written authority of any kind from her in the matter, and she never authorized him to turn over the note and assignment to the plaintiff; although, after Wagner had done so, he told her what he had done, and that the papers were to be used to try and get a settlement of both accounts, which she sanctioned on that understanding, but with no intent that the note and mortgage should be negotiated, or that the same should be a lien prior to that of the defendant corporations on the land. She never authorized any one

to fill in any name as assignee in the assignment. Both Wagner and wife testify that the deed was delivered as security for the husband's debt to the defendant corporation, and there is offered in evidence a schedule of notes aggregating \$1472.50, that had been assigned by Wagner to the defendant corporation, together with certain correspondence showing the Wagners to have always acted in accordance with their claim that they were the owners and defendant corporation but the mortgagee. Certain of said notes have been collected, and the proceeds retained by defendant corporation. They have offered no evidence on such matter.

Under the facts, the warranty deed from the wife to the corporation was one of general warranty, containing an exception as to the mortgage only in the covenant against encumbrances. In other words, the deed warrants title to the land and is a transfer of title without reference to encumbrances, except that an encumbrance is mentioned as being upon the land. It is noticeable that the land is not sold subject to the mortgage, or in other words the grantee does not take title to the land subject to this mortgage. A covenant against encumbrances and a covenant of warranty contained in a deed are separate and independent covenants of different import, and directed to different objects, and there is no presumption that language qualifying one of those covenants was intended to be transferred to or included in the other. The exception of the mortgage from the covenant against encumbrances does not thereby except such mortgage from the covenant of warranty in the deed. See *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827, and cases cited in the opinion; *Merritt v. Byers*, 46 Minn. 74, 48 N. W. 417; *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904.

The case of *Smith v. Gaub*, cited, is so nearly identical in facts as to be decisive of the case on trial. The deed in that case was exactly like the one in this case in all particulars, including the covenant as to encumbrances, which recited "that the same are free of encumbrances excepting a certain mortgage amounting to \$400 in favor of W.," with the other usual covenants. After the delivery of the deed and payment of consideration, the grantor purchased the outstanding encumbrance and brought an action to foreclose the same against his grantee, and it was held that the mortgage purchased by plaintiff was not excepted from the covenant of warranty contained in the deed, nor was it assumed by the defendant, and that the purchase of the same by



plaintiff inured wholly to the benefit of the defendant, and plaintiff would not be permitted to maintain an action to foreclose the same against the land deeded.

Under the deed containing covenants of general warranty, after its delivery, it was the grantor's duty to pay the outstanding encumbrance. Until such encumbrance was paid or satisfied, she was personally liable under her covenant of warranty. *Mickels v. Townsend*, 18 N. Y. 575. She could not take an assignment of such outstanding encumbrance to herself without it operating as a discharge of such mortgage assigned, regardless of her intent in the matter. If she intended the assignment as such, it operated as a satisfaction of the mortgage, and, of course, if it was intended to be a satisfaction instead of an assignment, and the money was paid to the mortgagee to satisfy the mortgage, the same was thereby satisfied. See *Kelley v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Brown v. Lapham*, 3 Cush. 551; *Putnam v. Collamore*, 120 Mass. 454; *Frey v. Vanderhoof*, 15 Wis. 398; *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; *Burnham v. Dorr*, 72 Me. 198; *Clay v. Banks*, 71 Ga. 363; *Butler v. Seward*, 10 Allen, 466; *Kneeland v. Moore*, 138 Mass. 198; *Northwestern Nat. Bank v. Sloan*, 97 Iowa, 183, 66 N. W. 91; *Dollar Sav. Bank v. Burns*, 87 Pa. 491; *Converse v. Cook*, 8 Vt. 164; *Zimpleman v. Veeder*, 98 Ill. 613; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, 51 N. W. 379; *Yerkes v. Hadley*, 5 Dak. 324, 2 L.R.A. 363, 40 N. W. 340; *Clark v. Baker*, 14 Cal. 633, 76 Am. Dec. 449.

At the time the note and assignment in blank were delivered by Wagner to the agent of plaintiff, the debt secured by the mortgage, assuming it still existed, was long past due, and the deed against which the lien by mortgage would be sought to be asserted had been of record for a considerable time prior thereto. If Mrs. Wagner herself could not have foreclosed this mortgage, she certainly could not give the right to do so to the plaintiff, as she could not give the plaintiff greater rights under the assignment than she herself had, and even if plaintiff was a purchaser, if the mortgage purported to be so assigned, he, as such purchaser was bound to ascertain the equities of such prior grantee of the mortgagor against whom he would enforce such mortgage. See *Mickles v. Townsend*, 18 N. Y. 575; *Clay v. Banks*, 71

Ga. 363; *Carlton v. Jackson*, 121 Mass. 592, and other cases above quoted.

But it may be claimed that the deed from Mrs. Wagner to the defendant corporation is in fact a mortgage, a mere lien as security for debt. The rule is the same, and the mortgage is a conveyance within the rule above announced under the authorities (see also §§5039 and 4870, Rev. Codes 1905), and an assignment of mortgage is a transfer within the Code provision cited, (see *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43.)

The mortgage, being once paid could not be revived. *Luce v. American Mortg. & Invest. Co.* 6 Dak. 122, 50 N. W. 621. This is a decision of the supreme court of Dakota territory. A corporation owner of land paid mortgages thereon, but, instead of having them satisfied, had them assigned to itself. It thereafter agreed that the mortgages so assigned might stand as collateral security for a note thereafter given. The court held the assignment operated as a payment, and that the mortgage was not thereafter invested with any validity for such purpose.

The law is well settled by the foregoing authorities that the assignment of the mortgage was in effect a satisfaction of it; merging it in the fee title if the deed from Wagner to the defendant corporation be, in fact, a mortgage; and if said deed be either absolute or a mortgage, the law conclusively presumes the assignment was obtained for the benefit of the grantee in the deed, and in protection of the warranty in the deed to the effect that the after-acquired title or lien inures to the benefit of the grantee in the deed, under § 6155, Rev. Codes 1905. See *Adam v. McClintock*, ante 483, 131 N. W. 394, by this court so recently decided as to be unreported. And the mortgagor and grantor is also estopped from denying the recitals and covenants in the deed, and asserting, as against it, the validity of the outstanding encumbrance after acquired by such mortgagor and grantor. He is therefore not permitted to claim, as against the grantee, that the assignment is other than a satisfaction of the mortgage. The mortgage then was in legal effect paid and satisfied upon the delivery of the assignment by the mortgage to Wagner. The obligation evidenced by the note ceased to exist when paid, and the mere redelivery of the note with assignment of the mortgage conveyed nothing and created no lien.

The proof in this action was offered principally on the question of the validity of the mortgage attempted to be asserted by plaintiff. All the defendants united their efforts on this matter, and evidently overlooked submitting proof under their pleadings, on whether the deed was in fact a deed or mortgage as between the Wagners and Foley Brothers & Kelly, a corporation. There is considerable testimony tending to establish that the deed was actually a mortgage, and in the foregoing discussion, following the facts as shown by the evidence offered touching the same, we have spoken of the deed as security for an indebtedness; but we realize that before a deed should be declared a mortgage, the proof as to the same should be "clear, specific, satisfactory, and convincing" (McGuin v. Lee, 10 N. D. 160, 86 N. W. 714), "and leave in the mind of the chancellor no hesitation or substantial doubt" that the deed was in fact a mortgage (Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454). Measured by this rule, we cannot from the proof satisfactorily determine whether the deed in question is in fact, as between the grantor and the grantee therein, a deed or mortgage; and if it be a mortgage the proof is indefinite as to the amount due thereon to defendant corporation. Accordingly, the parties defendant should be left to determine these questions by agreement between themselves, or in an appropriate action wherein they can litigate these questions, and therefore we here determine neither of them; nor is this action to be construed as *res judicata* on the rights of the grantor and grantee in said deed in any subsequent action to determine their rights in such particulars.

We should, in justice to the trial court, mention that the judgment appealed from in this case was entered prior to the decision of Smith v. Gaub, 19 N. D. 337, 123 N. W. 827, settling the question involved herein, and regarding which many courts have held as did the trial judge in this action. Had Smith v. Gaub been decided prior to the trial of this action, the learned trial judge doubtless would have considered that case controlling, as it is on the issues involved herein, and the decision below would probably have been otherwise.

Accordingly, the decree of foreclosure entered in the lower court should be set aside in all things, and plaintiff's action dismissed, with costs allowed in both courts to both defendants, assessed against the plaintiff.

It is so ordered.

MORGAN, Ch. J., not participating.

THE STATE OF NORTH DAKOTA ON THE RELATION OF  
THE SECURITY BANK OF KNOX, a Domestic Corporation  
v. CHARLES W. BUTTZ, Acting Judge of the Second Judicial  
District of the State of North Dakota, and the District Court of the  
County of Benson.

(131 N. W. 241.)

**Mortgages — Enjoining Foreclosure — Words and Phrases — “Mortgagor.”**

1. The word “mortgagor” as used in § 7454, Revised Codes 1905, relative to enjoining real estate mortgage foreclosure sales, includes those persons in privity to and claiming under the mortgagor.

**Mortgages — Subsequent Mortgagee May Enjoin Foreclosure.**

2. A subsequent mortgagee may make the necessary affidavit and enjoin the sale.

**Mortgages — Enjoining Foreclosure — Sufficiency of Affidavit.**

3. The affidavit upon which the restraining order is based should set forth the facts, for the satisfaction of the judge of the district court; but the facts need not be stated with the same particularity required of pleadings. The affidavit in this case examined, and *held*, sufficient to confer jurisdiction.

Opinion filed May 10, 1911.

Certiorari to District Court, Benson county; *Buttz*, Judge.

Certiorari by the state, on the relation of the Security Bank of Knox, against Charles W. Buttz, acting judge of the Second Judicial District, and another.

Writ quashed.

*Stuart & Comstock*, for petitioners.

*Torger Sinness*, for respondent.

BURKE, J. Relator brings certiorari to test the jurisdiction of the district court of Benson County North Dakota, to enjoin a real estate mortgage foreclosure sale by advertisement. Two grounds are urged against the jurisdiction of the lower court: First, that the affidavit upon which the restraining order is based was made by a subsequent mortgagee, and not by the mortgagor, his agent, or attorney, and second, that said affidavit is not sufficient to confer jurisdiction, because it states conclusions of law instead of facts.

It will be noted in the beginning that this writ is merely to determine whether or not the lower court had jurisdiction of the matters before it, and not to review its rulings from a discretionary standpoint. If the lower court had jurisdiction, we are not concerned at this time with the wisdom of its rulings. Keeping this in mind, we hold that the affidavit was not subject to attack upon either of the above-mentioned grounds, and that the trial court had jurisdiction.

While it is true § 7454, Revised Codes 1905, mentions only the mortgagor, his agent, or attorney, we feel that the legislative intent was to provide relief in cases where injustice would be done to the mortgaged estate if a sale by advertisement were to proceed, and that the affidavit might be made by anyone having an interest in the premises holding in privity to and under the mortgagor. This view was taken by this court in the case of *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, and the reasons given in the opinion in said case seem sound to us, and will be followed.

The affidavit is not subject to attack upon the other ground mentioned,—that conclusions of law, and not facts, are therein cited. The affidavit sets forth that the mortgagee is foreclosing by advertisement, and that the subsequent mortgagee is interested as such and has a defense to the debt secured by the mortgage about to be foreclosed. That in the notice of sale “about \$500 more is claimed due upon said mortgage than is actually due upon said mortgage.” We think the affiant has stated an ultimate fact, to wit: That the mortgagor is attempting to collect an overcharge of \$500 upon his mortgage. He need not plead his evidence. It nowhere appears that affiant knew any facts regarding the overcharge excepting those stated. Facts very similar to those in this case were before this court in the case of *McCann v. Mortgage, Bank & Invest. Co.* 3 N. D. 172, 54 N. W. 1026, and Judge Wallin held the affidavit sufficient, and used the following language: “It sufficiently appeared by the affidavit that the mortgagee had instituted foreclosure proceedings by advertisement, and also that the mortgagor had a ‘valid defense’ against the collection of the whole of the ‘amount claimed to be due on such mortgage.’ These general averments, if satisfactory to the judge who made the order, would be alone sufficient to authorize the judge at his discretion to make the order. . . . The proceeding is wholly statutory, and there is no requirement that the affidavit made on behalf of the mortgagor shall be couched

in any specific terms, nor that it shall be framed under the strict rules governing the pleader in framing the pleadings in an action. All that is required is that the facts enumerated in the statute shall be set out in the affidavit, in such manner and form as will satisfy the judge to whom the affidavit is presented. . . . We think the statute is not intended to be mandatory, but is, on the contrary, intended to clothe the judge of the district court with a pure discretion, which, unless abused, cannot be reviewed in an appellate court."

It is clear from the above reasoning that the affidavit in the case at bar, while subject to criticism, is sufficient to confer jurisdiction upon the trial judge, and the writ of certiorari is hereby dissolved.

SPALDING, J., dissenting in part.

SPALDING, J., dissenting: I cannot assent to the holding that the affidavit on which the judge of the district court based his order staying the foreclosure sale advertised, and directing that all further proceedings, if any, be had by action, was sufficient to confer jurisdiction to make such order. Section 7454, Rev. Codes 1905, was enacted by the territorial legislature in 1883, and provides that "when the mortgagee or his assignee has commenced proceedings for the foreclosure of a mortgage by advertisement, and it shall be made to appear by the affidavit of the mortgagor, his agent, or attorney, to the satisfaction of a judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim, or any other valid defense, against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin, etc." Our legislature has done away with the distinction between a judge and a court. It seems to me that when the legislature provides a new method of procedure, and, in the enactment providing it, copies almost verbatim the language of a statute relating to another proceeding, in stating what is necessary to give the court jurisdiction, and when the latter statute has received a uniform and well understood construction in many states, and particularly in our own, it may be inferred with some degree of certainty that the construction followed, as to the meaning and effect of the older statute, should apply to the later enactment. It must be borne in mind that under our procedure for the foreclosure of mortgages by advertisement, no provision, aside from this section, brings into action the powers of

the district, or any other, court. It is a proceeding entirely outside the judicial department of the state. If a court is to take jurisdiction in the premises, and stay proceedings, its action must rest upon some specific act giving it jurisdiction of the subject-matter at least. It is clear that the affidavit provided for in § 7454, supra, if that section is a valid enactment, which question is not here raised, and never has been in this court, must be the foundation of the court's jurisdiction to make the order enjoining the sale pursuant to the advertisement. It is the only basis provided for the action of the court, and the very purpose of it is to give the court jurisdiction to make the order, and without such jurisdiction the court has no power to make such order, and, if made, it is invalid. That the language of § 7454, supra, was taken from § 104 of the 1877 Code of Civil Procedure, is apparent by a comparison. Sec. 104 of that Code provided for courts acquiring jurisdiction in certain cases by the publication of a summons, and, so far as necessary to our consideration, reads: "Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it in like manner appears that a cause of action exists, . . . such court or judge may grant an order that the service be made by the publication of a summons . . ." In § 7454 we find: "And it shall be made to appear by the affidavit of . . . to the satisfaction of a judge of the district court, . . . that the mortgagor has a legal counterclaim or any other valid defense. . . ." The only difference in the requirement is that one reads, "shall be made to appear," and the other, "that fact appears." The language in § 104 has been construed repeatedly by this court, and by the courts of other states having the same or similar provisions, and the uniform holding has been that the language of the provision requires the statement of facts in the affidavit on which the mind of the judge or court act, and from which he can draw a legal conclusion; that statements of conclusions of law are inadequate to confer jurisdiction on the court to make the order of publication; and that without the statement of such facts no jurisdiction is acquired, and a judgment based thereon, in the absence of personal service, or an appearance, is void. The attention of the bar was first called to this in territorial days, by remarks and an opinion by Judge Shannon, of the territorial supreme court, in 1 Dak. 500. The correctness

of his opinion in that instance has, so far as I know, never been questioned, and certainly has been uniformly followed by the territorial and state courts. See *Beach v. Beach*, 6 Dak. 371, 43 N. W. 701; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095; *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708. The opinion in the last-named case was written by Judge Fisk, then a district judge, sitting on this bench, and contains a clear discussion of the subject.

In the case at bar the only allegation of facts attempted to confer jurisdiction on the court to make the order as relates to the defense or counterclaim is "that the said mortgagor has a defense and counterclaim to the mortgage now being foreclosed, . . . in that in the notice about \$500 more is claimed due upon said mortgage than is actually due thereon." It contains no allegations of fact either probative or ultimate, on which this conclusion as to the excessive amount claimed is based. That an allegation as to the amount due or not due is merely a conclusion of law, there can be no question. That is elementary. Even in Ohio, where the common counts are sustained, it is held that an affirmation that there is a certain amount due from the defendant to the plaintiff, without stating for what, or showing grounds of liability, is not good for anything. *Moorman v. Schmidt*, 69 Ohio St. 328, 69 N. E. 617.

Every reason requiring a statement of facts showing a cause of action, or the grounds for the publication of a summons under § 104, supra, applies to the procedure in the case at bar, and with increased force. The proceeding in this case is made without notice, and the sale stopped, with no opportunity on the part of the party foreclosing to protect himself; in fact the courts hold that counter affidavits, even if he has notice, cannot be received or considered. It is not a question of trying the merits of the defense or counterclaim, but the question is, Does the affidavit state facts which, taken at their face, constitute a defense or counterclaim. If it does not, then the court acquires no jurisdiction to issue the order restraining the sale.

I cannot concur with my associates in their conclusions that the case of *McCann v. Mortgage, Bank & Invest. Co.* 3 N. D. 172, 54 N. W. 1026, is any authority whatever for sustaining the action of the district court in the case at bar. In the first place, the majority opinion omits the sentence of the opinion in the *McCann Case* on which the decision of this court was based. The quotation stops when it reaches



the material part of the opinion, which reads: "But the affidavit goes into detail and sets out specific facts which tend to show that the sum claimed to be due upon the mortgage was claimed as interest, and that no interest was due upon the note secured by the mortgage in question." From this quotation it will be seen that the affidavit under consideration in that case was materially unlike the one we are considering, in that it did state the facts, showing on the face of the statement a defense to the foreclosure proceedings. The majority opinion in its quotation omits a further phase which is vital, wherein it was said, all that is required is that "the facts enumerated in the statute shall be set out in the affidavit in such manner and form as will satisfy the judge to whom the affidavit is presented." Therein it was expressly held that it is required that the facts be enumerated, and that is the particular in which, in the case at bar, the affidavit is fatally defective; it enumerates no facts. Much that is said in the opinion in the McCann Case is clearly *obiter*. It is possible that the writ applied for in the instant case should be denied on the ground that the applicant possesses another speedy and adequate remedy, but, as this is not discussed in the majority opinion, I pass it. I maintain that the requirement that the mortgagee or his assignee state, in his affidavit, the facts showing a defense or counterclaim, presents no difficulty, and works no hardship. If he has any such facts, he knows what they are and can state them in a plain and simple manner, devoid of legal terminology or phraseology, and it will answer every purpose. If he fails to state them, the judge can call his attention to that fact, and he can amend his affidavit, if able to do so, and if not, secure counsel. In my judgment, the granting or refusing of the order restraining the sale is not a discretionary matter with the judge; but when the affidavit states the necessary facts showing on their face that a defense or counterclaim exists, it is his duty to grant the order, and it is equally his duty to refuse it, unless such showing is made *prima facie*.

In *Victor Mill. & Min. Co. v. Justice Ct.* 18 Nev. 21, 1 Pac. 831, the supreme court of that state had under consideration the provisions of a statute identical with § 104 of our 1877 Code, and an affidavit for the publication of a summons in which the attempted statement of the cause of action was as follows: "That said action is brought to recover \$273 due from the defendant to the plaintiff on account for work and labor done for defendant at Candelaria, Nevada, between March

15th, 1879, and March 15th, 1880, a voucher or statement of which is attached to my complaint herein; and interest on the same sum." And that court held that this statement was simply a legal conclusion, even though it was based on an unverified complaint stating a cause of action and filed in the action; and that an affidavit which merely repeats the language of the statute or its substance is not sufficient, but that the ultimate facts of the statute must be proven by the affidavit by showing the probative facts upon which the ultimate facts depended, and that it is not sufficient for the order to state that the ultimate facts appear to the satisfaction of the court, but that they must be sustained by the probative facts stated in the affidavit, and that they must be sufficient to justify the court in being satisfied of the existence of the ultimate facts required by the statute before it has jurisdiction to make its order.

The 1858 statutes of Wisconsin required that it should appear by affidavit that a cause of action exists against the defendant in respect to whom service is to be made, and it was held in *Slocum v. Slocum*, 17 Wis. 150, that an affidavit for service which stated that the action was for an account between the parties, and to remove a cloud upon plaintiff's title to real estate which the defendant claims to hold under a marshal's sale of execution, while the plaintiff claims that the execution debt was fully paid before the sale, did not show a cause of action; that the officer to whom application for the order of publication is made must be satisfied from the facts set out that a cause of action exists; that the ultimate facts required by the statute must be proven by showing probative facts upon which each ultimate fact depends; that it is not sufficient to state that plaintiff has a good cause of action against the defendant, but the fact should be set out which shows the existence of the cause of action; and that to allow a bald repetition of the language of the statute to take the place of the facts which constitute the conditions under which it is to appear is to strip the court or judge to whom application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts,—a process too dangerous to the rights of defendants to admit of judicial toleration. *Ricketson v. Richardson*, 26 Cal. 149; *Fiske v. Anderson*, 33 Barb. 71; *Peck v. Cook*, 41 Barb. 549. Some authorities hold that, where the order recites the jurisdictional facts, it cures such defects in the affidavit. I think such holdings are

usually, if not universally, made upon a statutory provision to that effect, but we find in the order made in the instant case no recitations whatever; it simply recites that it was made upon the affidavit annexed. See also *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508; *Forbes v. Hyde*, 31 Cal. 342; *Neff v. Pennoyer*, 3 Sawy. 274, Fed. Cas. No. 10,083. I am of the opinion that neither the judge nor the court acquired jurisdiction to make the order complained of.

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**BISMARCK GROCERY COMPANY, a Corporation, v. A. H. YEAGER, SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, Garnishee.**

(131 N. W. 517.)

**Opening Default Judgment — Delay.**

1. When application is made to the district court, under § 6884, Revised Codes 1905, for relief from a default judgment, the fact that both the plaintiff and the garnishee had signed a stipulation providing, among other things, that the judgment would be opened, and such stipulation had failed through no fault of the parties, is a sufficient excuse for the delay occasioned thereby.

**Opening Default Judgment — Affidavit of Merits — Merits Passed Upon by Court.**

2. Such application must be accompanied by an affidavit of merits; such affidavit of merits may set up all of the facts of the case, and be presented to the court itself for an inspection of the merits. It is not necessary that the client submit the facts to an attorney for an opinion upon the merits.

Opinion filed May 11, 1911.

Appeal from the District Court, Burleigh county; *Winchester*, Judge.

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Note.—The question of the effect and construction of statutes authorizing the vacation and setting aside of judgments by default is the subject of a note reviewing many cases in 58 Am. Dec. 392. The sufficiency of the affidavit of merits which must accompany the application is also considered in this note, and, while the rules in the different states with regard to the necessity of setting out the matters constituting the defense vary, all the cases unite in requiring that the affidavit shall show that the default occurred through "surprise, mistake, inadvertence, or excusable neglect," and shall state the facts constituting such surprise, etc.

Action by the Bismarck Grocery Company against A. H. Yeager. The Springfield Fire & Marine Insurance Company, garnishee. Judgment for defendant, and plaintiff appeals.

Affirmed.

*Newton, Dullam, & Young*, for appellant.

One seeking relief from a default judgment must act promptly, and furnish affidavit of merits. *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151.

Must show a defense, and that there is nothing to render it nugatory. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350; *Burnham v. Smith*, 11 Wis. 259; *Freeman*, Judgm. § 108; *Gauthier v. Rusicka*, 3 N. D. 1, 53 N. W. 80; *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581; 6 Enc. Pl. & Pr. 189 et seq.

Valid defense must be set up in answer. *Sargent v. Kindred*, and *Wheeler v. Castor*, supra; *Gerish v. Johnson*, 5 Minn. 23, Gil. 10.

There must be diligence in making the application. 6 Enc. Pl. & Pr. pp. 189-192; 1 Black, Judgm. §§ 340 and 387; *Grootemaat v. Tebel*, 39 Wis. 576; *Pringle v. Dunn*, 39 Wis. 435; *Hunt v. Swenson*, 15 N. D. 512, 108 N. W. 41; *St. Paul Land Co. v. Dayton*, 39 Minn. 315, 40 N. W. 66.

*R. N. Stevens* and *Scott Rex*, for respondent.

Orders for opening default judgments are purely discretionary. *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; *Colean Mfg. Co. v. Feckler*, 16 N. D. 227, 112 N. W. 993; *Patterson Produce & Provision Co. v. Wilkes*, 1 Ga. App. 430, 57 S. E. 1047; *Atlanta Journal v. Brunswick Pub. Co.* 111 Ga. 718, 36 S. E. 929; *Miller v. Port Gibson Brick & Mfg. Co.* 78 Miss. 170, 28 So. 807.

BURKE, J. Upon February, 14, 1908, when fire destroyed defendant's store and contents, he was indebted to many creditors, including plaintiff, to whom he owed over \$700. Six insurance companies sustained losses upon policies of insurance, this garnishee being liable upon a policy of \$1,000. The funds in the hands of the insurance companies were garnisheed by the different creditors. This garnishee was served with some five or six garnishee summonses, this plaintiff having the fifth claim upon the funds in its hands. This suit was begun March 25, 1908, and judgment was entered against this garnishee by

default May 1, 1909, in the sum of \$754.35. An application was made to the district court of the proper county (Burleigh) under § 6884, Revised Codes 1905, upon January 10, 1910, for relief from such default. The application was based upon an affidavit of the state agent of the garnishee, setting forth at great length all of the facts, and attaching thereto all of the correspondence therein mentioned. This affidavit is too long to be set out in this opinion, and we shall give but its substance. Affiant states that he is the state agent for the garnishee and has full charge of its affairs in this state; that, upon learning of the suit, he wrote to the attorneys for the plaintiff, stating all of the facts known to him, and especially that his company had sustained a loss upon the policy, but had reached no settlement with Yeager, so the liability was undetermined; that in said letter he asked the said attorneys to prepare a suitable form of disclosure for execution by the company; that no reply was received to this letter, and two weeks later he wrote again, and received a reply to the effect that the disclosure would be prepared as soon as the amount of the liability was ascertained; that affiant was obliged to leave the state temporarily, and again wrote to plaintiff's attorney mentioning his proposed absence, and asking them to send the disclosure direct to the company, because the thirty days period would expire before affiant's return; that no reply was ever received by him to this letter, and he believed that disclosure had been made; that sometime during the following October said attorneys wrote affiant regarding the case, but, owing to his belief that the proper disclosure had been made, affiant misunderstood the plain import of the letters, and failed to protect garnishee's interests, and the judgment was entered by default; that upon learning of the judgment, affiant caused to be prepared, circulated, and signed a stipulation to the effect that all of the insurance companies pay into court the amounts due upon the several policies, to abide the final order of the court, and that this garnishee be thereupon relieved from its default; that this plaintiff and this garnishee each signed said stipulation, and it was signed by all of the creditors and by all of the insurance companies excepting one, who finally denied any liability on account of the fire; that, owing to the various parties to the stipulation living in different and widely scattered localities, a great deal of time was consumed before it was finally known that the stipulation must fail on account of one insurance company declining to sign; that promptly upon learning

this fact, affiant applied to the district court for relief; that the reason of the delay in arriving at the amount of the liability was the fact that Yeager had refused to accept the adjustment allowed by the board appointed for that purpose under the terms of the policy; that the attorneys for each of the other creditors had prepared disclosures for his company, and they had been duly filed. For his affidavit of merits, he states that his company has been served with four prior garnishee summonses, by creditors claiming more money than was ever due Yeager under his policy, and that probably no funds whatever were available for this plaintiff; that, in any event, the judgment entered was for some \$100 more than the agreed liability upon the policy, so that, if the judgment was allowed to stand, this garnishee would have to pay the amount of its liability twice, and then another \$100 besides.

The district court granted the relief applied for, conditioned that the garnishee pay the amount due under the policy into court, and pay to the plaintiff \$25 costs. This appeal is from such order, and it is urged that the foregoing affidavit neither excuses the delay nor shows a proper form of an affidavit of merits.

(1) We think the facts shown excuse the delay. Up to the time of the entry of the judgment, the garnishee had reason to believe a disclosure had been made. After discovering the judgment, the garnishee relied upon the proposed stipulation to relieve itself from the judgment. As the stipulation had been signed by this plaintiff, it was but natural that this garnishee should rely for relief upon its completion before applying to the court. As soon as it was known that the stipulation had failed, the appeal was made to the district court.

(2) It is contended that the affidavit of merits is defective for failure to state that all of the facts of the case had been submitted to an attorney, and his opinion obtained that the evidence set up is meritorious. We do not believe the above statement necessary, where, as in this case, all of the facts of the case are set forth and presented, for the court itself to pass upon the merits. There are two forms of affidavits of merits recognized by the courts. The older form, wherein all of the facts are set out for the inspection of the courts, and the other form, wherein affiant states that he has submitted all of the facts to his attorney, and has by him been advised that his defense is meritorious. The latter form has been in general use in North Dakota since statehood, and will, of course, be recognized by this court. However, we

hold that the older form is also legal in this state. Our attention has been called to but three states (California, Michigan, and Wisconsin) besides our own, recognizing the latter rule, and California (*Woodward v. Backus*, 20 Cal. 137), while tolerating the latter rule, uses this language: "It would have been better, perhaps, if the affidavits, instead of stating that the case had been fully and fairly stated to counsel, etc., in the usual form, had set forth the facts constituting the defense." Freeman on Judgments, 4th ed. § 108, says: "As to the contents of the affidavit of merits, the practice differs essentially in different states. The more reasonable, in our judgment, is the one which requires the moving party to disclose his cause of action or ground of defense, with such particularity as enables the court to determine whether or not it is good and sufficient on the merits. The other and less defensible practice substitutes the moving party and his counsel for the court, and accepts their judgment as conclusive." See also Black on Judgments, 2d ed. § 347; also 23 Cyc. page 956, and cases cited. While this court has recognized the inferior form of affidavit as sufficient, it has never held the superior form insufficient, and we now hold that either form may be used in this state. The especial opinion of Judge Corliss in the case of *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, and Rule XII. of the district courts, found in the front of vol. 6 N. D., were written with the latter rule only in mind, and apply only to cases wherein the opinion of the attorney is substituted for the judgment of the court, and, of course, do not apply to the case at bar.

The order appealed from was right, and is affirmed.

MORGAN, Ch. J., not participating.

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**CITIZENS' BANK OF DRAYTON, a Corporation, v. A. SCHULTZ.**

(132 N. W. 134.)

**Appeal and Error — Grant of New Trial — Grounds.**

1. An order granting a new trial will not be disturbed on appeal where the record discloses any tenable ground in support of such order.

**New Trial — Newly Discovered Evidence.**

2. Among the grounds on which a motion for a new trial was predicated is that of newly discovered evidence. In support thereof respondent furnished an affidavit showing admissions made by appellant to a third person prior to the trial, having, on appellant's theory of the case, very material relevancy to an important issue of fact. Respondent did not acquire knowledge of such admission until after the trial.

*Held*, that such newly discovered evidence was amply sufficient to warrant a new trial.

Opinion filed June 1, 1911.

Appeal from District Court, Walsh county; *W. J. Kneeshaw*, Judge. Action by the Citizens' Bank of Drayton against August Schultz. From an order granting a new trial after judgment for defendant, defendant appeals.

Affirmed.

*C. A. M. Spencer*, for appellant.

Failure to protest and notify of dishonor releases indorser. *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 38 L.R.A. 843, 72 N. W. 901; 2 Dan. Neg. Inst. §§ 970, 1039, 1464; 2 Edwards, Bills & Notes, §§ 790, 829, 833; *Carroll v. Sweet*, 128 N. Y. 19, 13 L.R.A. 43, 27 N. E. 763; *Mohawk Bank v. Broderick*, 10 Wend. 304; Rev. Codes 1905, §§ 6368, 6391, 6398, 6404, 6406, 6498; 2 Dan. Neg. Inst. §§ 1170, 1172; *Grimes v. Tait*, 21 Okla. 361, 99 Pac. 812; *Citizens' Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171; *Brown v. Ferguson*, 4 Leigh, 37, 24 Am. Dec. 707; *Page v. Loud*, Harp. L. 269, 18 Am. Dec. 650; *Nash v. Harrington*, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

Substitution of a new debtor releases indorser. *Illinois L. Ins. Co. v. Benner*, 78 Kan. 511, 97 Pac. 438; *Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.* 78 N. J. L. 309, 73 Atl. 254.

*Scott Rex*, for respondent.

An order granting a new trial will be sustained on appeal if any of the grounds for the motion are good. *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314; *Roberts v. First Nat. Bank*, 8 N. D. 474, 79 N. W. 993; *Bothell v. Hoellwarth*, 10 S. D. 491, 74 N. W. 231; *State v. Hammond*, 14 S. D. 545, 86 N. W. 627; *Gooler v. Eidsness*, 18 N. D. 338, 121 N. W. 83.

The trial court has a wide discretion as granting new trials on grounds of surprise, accident, newly discovered evidence, and insuffi-



ciency of evidence, and will be reversed only for abuse. *Pengilly v. J. I. Case Threshing Mach. Co.* 11 N. D. 249, 91 N. W. 63; *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612; *Gull River Lumber Co. v. Osbrone McMillan Elevator Co.* 6 N. D. 276, 69 N. W. 691; *Patch v. Northern P. R. Co.* 5 N. D. 55, 63 N. W. 207; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *Gooler v. Eidsness*, 18 N. D. 338, 121 N. W. 83; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397.

Appellant could sue for money had and received, and show the indorsement was to facilitate collection. *Dickinson v. Burke*, 8 N. D. 118, 77 N. W. 279; *Spencer v. Sloan*, 108 Ind. 183, 58 Am. Rep. 35, 9 N. E. 150; 8 Cyc. 225, 262, 265; *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Lovejoy v. Citizens' Bank*, 23 Kan. 333; *Dan. Neg. Inst.* § 720; *True v. Bullard*, 45 Neb. 409, 63 N. W. 824.

Where a check is dishonored in the indorsee's hands, and he knows it, he is not entitled to notice. *Dan. Neg. Inst.* § 1596; 7 Cyc. 1131; *Williams v. Brobst*, 10 Watts, 111; *First Nat. Bank v. Currie*, 147 Mich. 72, 9 L.R.A.(N.S.) 698, 118 Am. St. Rep. 537, 110 N. W. 499, 11 A. & E. Ann. Cas. 241; *Humphries v. Bicknell*, 2 Litt. (Ky.) 297, 13 Am. Dec. 268.

Burden was on respondent to prove novation. *Lokken v. Miller*, 9 N. D. 512, 84 N. W. 368; 22 Am. & Eng. Enc. Law, p. 555; *Combination Steel & I. Co. v. St. Paul City R. Co.* 47 Minn. 207, 49 N. W. 744; *Willow River Lumber Co. v. Luger Furniture Co.* 102 Wis. 636, 78 N. W. 762; 30 Cyc. 194, note 33.

There was no novation. *Rev. Codes* 1905, § 5274; 29 Cyc. 1130, 1139; *Haubert v. Mausshardt*, 89 Cal. 433, 26 Pac. 899; 21 Am. & Eng. Enc. Law, pp. 666, 672; *Johnson v. Rumsey*, 28 Minn. 531, 11 N. W. 69; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Lowe v. Blum*, 4 Okla. 260, 43 Pac. 1063; *McAllister v. McDonald*, 40 Mont. 375, 106 Pac. 882.

**FISK, J.** Action for money had and received. Defendant had judgment in the court below, and thereafter plaintiff moved for a new trial basing its motion upon the ground, among others, of newly discovered evidence, and from an order granting such motion, this appeal is prosecuted. The record does not disclose the ground upon which such motion was granted, but it is well settled that such order will not be disturbed if there is any tenable ground for its support. *Gooler v. Eids-*

ness, 18 N. D. 338, 121 N. W. 83; *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314.

We are entirely convinced that the learned trial court did not abuse its discretion in making the order complained of. While, as before stated, the order does not disclose the ground or grounds upon which it was made, we think the showing of newly discovered evidence amply justified the order complained of, and we deem it unnecessary to notice the other grounds of the motion.

The facts necessary to an understanding of the question presented are briefly as follows: On May 3, 1907, defendant received from the Drayton Milling Company a check drawn on the First National Bank of Drayton in payment for certain grain, and took it to plaintiff bank to be cashed. No one in the latter bank at his first visit knew him, and the check was not cashed. He then took it to the First National Bank and presented it for payment, and was informed that there were no funds in such bank available for its payment and that the check was not good. He then procured a person to identify him, and returned to plaintiff bank, where he obtained the money on such check. He was not a depositor in such bank, and the check was cashed purely as an accommodation, and without the knowledge that it had been presented for payment to the First National Bank and payment refused, and plaintiff bank did not learn of the worthlessness of the check until later in the day when it presented the check for payment at the First National Bank and such payment was refused. The record discloses that the milling company was insolvent and went out of business about a week after such transaction took place. In his answer defendant alleges that plaintiff was negligent in not protesting the check and giving him notice of its non-payment; and he alleges damages resulting therefrom, and also alleges payment of such check, but he furnished no proof in support of these allegations, except that plaintiff bank took from an officer of the milling company a demand note for the amount of the check, but no part of which note has ever been paid, and plaintiff offered to surrender such note to the defendant at the trial. At the conclusion of the trial, both parties having moved for a directed verdict, the court withdrew the case from the consideration of the jury, and made findings and conclusions in defendant's favor, and judgment was ordered and entered thereon.

Defendant at the trial sought to show that he was unable to read English, and did not know what bank the check was drawn on, and

that he did not understand that the officer of the First National Bank declined payment thereof upon the ground that the milling company had no funds on deposit to pay the same. On the theory of the law of the case most favorable to defendant, it became and was a material fact under the pleadings whether, prior to the time he procured plaintiff bank to cash the check, he had knowledge that the check was drawn on the First National Bank and that such bank had declined payment for lack of funds. If, with knowledge of these facts, he procured the plaintiff bank to cash this worthless check, his acts in so doing would amount to a fraud.

In support of its motion upon the ground of newly discovered evidence, plaintiff produced the affidavit of one Olson, and also an affidavit of its cashier, one Colley. Olson's affidavit, omitting formal parts, is as follows:

"O. C. Olson came before me personally, and being duly sworn, says that he resides in Drayton in said county and state; that he is by occupation an implement dealer; that on or about May 15th, 1907, affiant was in the office of Olson & Sons, at Drayton, North Dakota; that August Schultz, the defendant above named, was then present in said office, and that, in the course of conversation relative to the affairs of the Drayton Milling Company, the said Schultz stated that he was nearly caught by the mill company; that he, the said Schultz, had got a check from the mill company and went to the bank to cash it, but was refused; and that he then went over to the other bank, and got his money on such check, and that he, the said Schultz, was too smart for them, meaning, as affiant understood, that the said Schultz was too smart for the bank people who cashed the check; and that, as affiant understood, the check referred to by said Schultz in the above-mentioned statements by him was and is the same check which affiant is informed is in litigation in the above-entitled action.

G. C. Olson.

Colley's affidavit, omitting formal parts, is as follows:

J. G. T. Colley came before me personally, and, being sworn, says that during the times mentioned in the pleadings in the within-entitled action, he was the cashier of the plaintiff bank, and as such had active

charge and control thereof and of the within-entitled litigation; that during said time he was slightly acquainted with defendant; that defendant is, as affiant is informed and believes, of German birth and descent, but that he has lived for many years in the locality where he now lives, surrounded by farmers of other nationalities; that the defendant speaks and understands the English language without difficulty, and, as affiant verily believes, is a shrewd, intelligent, and well-informed man.

That affiant had no reason to apprehend, and did not apprehend, that defendant on the trial of said action would deny that he knew what bank the check in suit was drawn upon, and that plaintiff was taken by surprise by the testimony of defendant touching such matter.

That since the trial of said action, affiant has learned that shortly after the occurrence of the matters in controversy herein, defendant stated to one O. C. Olson, at Drayton, North Dakota, in substance that after payment of the check in suit had been refused by the bank on which it was drawn, he, the defendant, procured the same to be cashed at plaintiff bank, with the intent to cheat and defraud the plaintiff,—all as stated in the affidavit of said Olson hereto attached,—and that such statements and admissions of defendant were not known to affiant until after the trial of this case; that, if a new trial of this case is granted, the said Olson will testify as in his said affidavit stated.

J. G. T. Colley.

In rebuttal of such affidavits, defendant made an affidavit in which he states that while he has no present recollection of having the conversation referred to in Olson's affidavit, he might have made the statements herein set forth, but that if he did make the statement "that he was too smart for them," that he had reference to the Drayton Milling Company, and did not mean the plaintiff in this action, as he did not at that time have any knowledge that said plaintiff had in any manner lost anything by reason of cashing the check for him, and did not receive any information or knowledge thereof until notified by plaintiff on or about July 20th, 1907. He then denies having any intention of cheating or defrauding the plaintiff. The facts set forth in Olson's affidavit, if testified to at the trial, might and probably would have a very material effect on the issue of defendant's good faith in presenting the check for payment at plaintiff's bank. That such ad-

mission or statement claimed to have been made by defendant to Olson is newly discovered evidence, and that such affidavits furnish ample ground for the order complained of, we entertain no doubt. As lending support to our views, see 29 Cyc. 906; *Missouri P. R. Co. v. Lovelace*, 57 Kan. 195, 45 Pac. 590; *Mally v. Mally*, 114 Iowa, 309, 86 N. W. 262; *Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225; *Felver v. Judd*, 81 Ill. App. 529.

The order appealed from is affirmed.

MORGAN, Ch. J., took no part in the decision, HON. A. G. BURE, Judge of the Ninth Judicial District, sitting in his place by request.

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## BLUE GRASS TOWNSHIP v. MORTON COUNTY.

(132 N. W. 148.)

### **Statutory Construction — Highways — Road Taxes — Disposition.**

1. Section 3012, Rev. Codes 1905, which in effect prescribes that all road taxes collected by the county treasurer on property in "any incorporated city, town, or village" shall be turned over to the treasurer of such city, town, or village, "to be expended under the direction of the city council of such city, or of the board of trustees of such town or village, . . . in the improvement of the streets or bridges thereof, or of the roads approaching thereto," construed, and held, not to apply to civil townships.

### **Statutory Construction — Highway — Road Taxes — Disposition.**

2. Sections 1386 and 1398, Rev. Codes 1905, construed, and held, to apply only to counties not formed into civil townships. Section 1386 merely provides that in counties not formed into townships, the board of county commissioners shall divide the county into road districts, and § 1398 merely provides the manner in which such board shall expend the road taxes collected in such counties.

Opinion filed June 1, 1911.

'Appeal from Morton county; *W. C. Crawford*, Judge.

Action by Blue Grass Township against Morton County. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

*Shaw & Nuchols*, for appellant.

*H. R. Bitzing*, State's Attorney, *Hanley & Sullivan*, and *John Carmody*, for respondent.

FISK, J. Action by Blue Grass township, in Morton county, against such county, to require it to account for, and pay to plaintiff, the amount of all road or highway taxes levied and collected by it upon property in such township for the years 1886 to 1909 inclusive.

Plaintiff alleges in its complaint that it is, and at all times since 1885 has been, a duly organized civil township in such county, during all of which time its regularly elected supervisors have exercised supervision and control over the public highways therein, by opening, laying out, vacating, constructing, improving, and maintaining the same, and for such purposes have annually levied and collected a township road tax on all taxable property therein, which has been used for such purposes. Also that during each of said years defendant county has levied a county road tax on all such taxable property, and has collected large sums for each of said years, none of which has ever been expended in such township or paid over to plaintiff, but on the contrary has by it been appropriated solely to its use for county purposes.

The prayer, in effect, is that defendant be adjudged to be a trustee of the fund thus levied and collected by it, and that it be required to account therefor, and pay the same over to plaintiff, or that plaintiff have judgment against the county for the amount thereof. Defendant interposed a demurrer to such complaint, upon the ground that it fails to allege facts sufficient to constitute a cause of action, which demurrer was sustained in the court below, and the appeal is from the order sustaining such demurrer. Did such ruling constitute error? We are entirely clear that it did not, and will briefly set forth our reasons for such conclusion.

Appellant relies, for its right of recovery, upon §§ 3012, 1386, and 1398, Rev. Codes 1905. Its contention is that § 3012 should be so construed as to require the county to refund to the township all road taxes levied and collected by it in the same manner that it is required by said section to turn over to each incorporated city, town, or village the road taxes levied and collected by it in such municipalities. We are unable to place such a construction on this statute. The complete answer to appellant's contention is that the legislature, in its wisdom, has not seen fit to thus ordain. The language employed by

the legislative assembly is clear, and not susceptible of such construction; and it would require judicial legislation to give the statute the meaning contended for. The section reads as follows:

"Sec. 3012. All road taxes collected as personal taxes from residents of any incorporated city, town, or village, and all road taxes collected on account of real or personal property situated within any incorporated city, town, or village, by the treasurer of the county in which such city or town is located, shall be turned over quarterly by such treasurer to the treasurer of such incorporated city, town, or village, to be expended under the direction of the city council of such city, or of the board of trustees of such town or village, as the case may be, in the improvement of the streets or bridges thereof, or of the roads approaching thereto."

From a reading of the above section, it is perfectly apparent that the legislature did not intend to include therein civil townships, for it expressly provides that such funds thus turned over shall be expended "under the direction of the city council of such city, or of the board of *trustees* of such town or village. If it had been the legislative intent to also include civil townships, it would have been an easy matter to have designated them, and the failure so to do is a very significant fact entitled to much weight and which cannot be ignored in construing such statute. The very ingenious argument of appellant's counsel fails to convince us of the correctness of their contention. The equities of the case, as well as the seeming lack of a good reason for the discrimination between the designated municipalities and civil townships, might be of some aid in construing the statute if its language were open to more than one construction, but, as before stated, this is not the case. The legislature having spoken in unmistakable terms, the courts are bound to give effect thereto, and not thwart by judicial construction the clearly expressed legislative intent. With the wisdom or policy of the law the courts have no concern.

If the law works an injustice to the taxpayer in the civil townships, as contended by appellant, the remedy is with the legislature, not the courts. Nor are we able to agree with appellant's contention as to the history of this section. By the use of the words "incorporated city or town," as found in chapter 147, Laws of 1887 of Dakota Territory, it was clearly not the intent to include therein organized civil townships, but merely incorporated municipalities. This is apparent

from a reading of such territorial statute; and the reasons above given for our construction of § 3012, Rev. Codes 1905, apply with equal force to the statute as originally enacted. See *Parkston v. Hutchinson County*, 10 S. D. 294, 73 N. W. 76.

This brings us to appellant's second proposition, which is, that Blue Grass township is, by force of § 1386, Rev. Codes 1905, a road district, and, being such, it is entitled, under the provisions of § 1398, to have such funds expended therein, and consequently that the defendant county should be adjudged a trustee of these funds for such purpose. The fallacy of this contention is quite apparent. It rests upon an erroneous premise. Sections 1386 and 1388 have no application to counties formed into townships. Said sections only apply where, by reason of the absence of township organizations, the duty of constructing and maintaining highways is devolved upon the county commissioners. There is nothing to show that Blue Grass township is a road district, but, even if there was, we know of no law requiring the county to turn over to it all or any portion of the funds sued for in this action. In the Nebraska case cited by appellant (*Chadron v. Dawes County*, 82 Neb. 614, 118 N. W. 469), there was an express statute which, of course, was controlling. The statute there construed allowed each road district one half of the road taxes collected by the county on property in such district.

We conclude that the order sustaining the demurrer was correct, and the same is accordingly affirmed.

MORGAN, Ch. J., took no part in the decision. Hon. W. J. KNEESHAW, Judge of the Seventh Judicial District, sitting by request.

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### R. T. FROST v. JOHN HOELLINGER.

(132 N. W. 136.)

#### **Appeal and Error — Failure to Assign Errors — Rules of Court.**

When errors are not assigned in appellant's brief, as required by Rule 14, and no reason is disclosed why such rule should be relaxed, this court will not consider the appeal.

Opinion filed June 6, 1911.



Appeal from Ward County, County court; *Davis*, Judge.

Affirmed.

*James Johnson*, for appellant.

*Thompson & Schull*, for respondent.

SPALDING, J. This is an appeal from a judgment of the county court, having increased jurisdiction, of Ward county, rendered in favor of the plaintiff, and against the defendant. A statement of the case was settled, and a motion for a new trial was denied; but on due application the statement of the case was stricken out. This leaves nothing for this court to consider except the complaint and answer, the findings of fact, and conclusions of law, and the judgment; a jury having been waived. The action was brought to recover for services for superintending the construction of a building for the defendant, situated in the city of Minot. The complaint alleges that the respondent and one Hosmer were employed by the defendant about the 1st day of October, 1907, to superintend the construction of such building; that they accepted such employment, and thereafter superintended such construction until the 1st day of February, 1908, when said Frost and Hosmer dissolved partnership and the business was continued by the respondent Frost, he performing the services of superintendence from that date until the completion of the building, about the 1st day of July, 1908; and that he purchased of his late partner, on the dissolution, all accounts and bills receivable, contracts and assets of said firm, which were duly assigned to him; that the services rendered were reasonably worth, and the defendant agreed to pay, the sum of \$325.80 therefor. The answer admits such partnership, and that the said firm prepared plans and specifications for the building mentioned, and denies all other allegations of the complaint. The findings of fact are in harmony with the allegations of the complaint, and further find that, after the dissolution of the respondent's firm, respondent continued to superintend the construction of the building mentioned; with the further finding that, at the time of the commencement of the superintendence of the construction of such building, and at all times throughout the construction thereof, defendant knew that said firm, and after its dissolution the respondent, was performing such services, with the expectation of receiving compensation; and that the services rendered were reasonably worth, at the time of performance, the sum of \$325.80; that no part

has been paid. Judgment was entered against the defendant for the sum found due, with interest.

The appellant has failed to assign any errors in his brief, as provided by Rule 14 of this court (10 N. D. XLVI., 91 N. W. VIII.), and nothing is disclosed by the record making it appear that there is any ground why we should relax the requirements of such rule, and hence we are not justified in considering the appeal. *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667. However, an examination of the judgment roll discloses no error, and the judgment is affirmed.

MORGAN, Ch. J., not participating.

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## THE STATE OF NORTH DAKOTA v. SIMON KNUDSON.

(132 N. W. 149.)

### **Criminal Law — Argument of Counsel.**

1. Counsel, in argument to the jury, must confine himself to the evidence in the case, and should not go beyond the limits of legitimate argument and comment thereon.

### **Criminal Law — Remarks of State's Attorney — Objections — Caution and Reprimand by Court.**

2. Where the defendant alleges misconduct on the part of the state's attorney in his argument to the jury, and relies on the same as ground for reversal, he must first seasonably object thereto, and obtain a ruling from the trial court thereon, requesting the court to take action by reprimand to the counsel, instructions to the jury, or other suitable action; and if the instructions given do not sufficiently cover the point raised, he should request, in writing, additional instructions.

### **Criminal Law — Argument of Counsel.**

3. The evidence examined, and *held*, that the statement of counsel was based on the evidence in the case.

Opinion filed June 13, 1911.

Appeal from District Court, Nelson county; *Chas. F. Templeton*, Judge.

Simon Knudson was convicted of selling intoxicating liquors, and he appeals.

Affirmed.

*Bangs & Robbins*, for appellant.

Counsel's statements in argument not warranted by the evidence are prejudicial error. *People v. Carr*, 64 Mich. 702, 31 N. W. 590; *People v. Dane*, 59 Mich. 550, 26 N. W. 781; *Hurd v. People*, 25 Mich. 405; *Wellar v. People*, 30 Mich. 16, 1 Am. Crim. Rep. 276; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *State v. Prendible*, 165 Mo. 329, 65 S. W. 559; *State v. Fischer*, 124 Mo. 460, 27 S. W. 1109; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *State v. Young*, 99 Mo. 666, 12 S. W. 879; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Ferguson v. State*, 49 Ind. 33, 1 Am. Crim. Rep. 582; *State v. Irwin*, 9 Idaho, 35, 60 L.R.A. 716, 71 Pac. 608, 13 Am. Crim. Rep. 620; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *Baker v. Com.* 106 Ky. 212, 50 S. W. 54; *People v. Wells*, 100 Cal. 463, 34 Pac. 1078; *People v. Bowers*, 79 Cal. 415, 21 Pac. 752; *People v. Ah Len*, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; *Nalley v. State*, 28 Tex. App. 387, 13 S. W. 670; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *Myers v. Myers*, 111 Iowa, 584, 82 N. W. 961; *Hood v. Chicago & N. W. R. Co.* 95 Iowa, 331, 64 N. W. 261; *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; *Holder v. State*, 58 Ark. 473, 25 S. W. 279; *Flint v. Com.* 81 Ky. 186, 23 S. W. 346; *Newby v. People*, 28 Colo. 16, 62 Pac. 1035; *State v. Rodriguez*, 31 Nev. 342, 102 Pac. 863.

*Andrew Miller*, Attorney General, *Alfred Zuger* and *C. L. Young*, Assistant Attorneys General, for respondent.

Remarks justified by the evidence are not grounds for reversal. *State v. Nyhus*, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *State v. Goodman*, 78 Mo. App. 224; *Harmon v. Territory*, 15 Okla. 147, 79 Pac. 765; *Henderson v. State*, 51 Tex. Crim. Rep. 193, 101 S. W. 245; 12 Cyc. 576.

BURR, J. This appeal is prosecuted in this court on one specification of error, as follows: The state's attorney, in addressing the jury, made the following statement: "This witness (pointing to defendant) has perjured himself most damnably; deepest of all in testifying to the fact that for the past four years he has not sold any intoxicating liquors

in the city of Aneta, and hasn't gone about the street with his overcoat pockets filled with beer bottles." The information in this case charges the defendant with a felony in selling intoxicating liquors as a beverage, and that the defendant, prior thereto, had been convicted of wilfully and unlawfully selling intoxicating liquors. A verdict of guilty was rendered, and the court sentenced the defendant to imprisonment in the penitentiary for one year at hard labor. From the judgment rendered herein he appeals. The testimony for the state and for the defendant is very brief. The defendant was arrested upon the complaint of one Gilbert Davis, who is the only witness for the state, and he testified that he bought three bottles of beer from the defendant in the city of Aneta, paying therefor, and that the defendant, after receiving the order for the beer, went out from the place where they met, and shortly afterwards returned with the bottles of beer in his pockets, or, using the language of the witness Davis, "he carried the beer in his two hip pockets and one in his inside pocket, here." The defendant denied the sale and denied knowing the witness, stating that so far as he could remember he never saw him before the time he went on the stand at the preliminary examination, and that he did not know his name and never had anything to do with him. The defendant lived in Aneta, and the prosecuting witness testified that he, the prosecuting witness, had been employed as a drayman in Aneta for about a month; that he had made deliveries to the defendant at defendant's house, had seen him there, talked with him on three or four different occasions in the month prior to the sale; that the defendant knew his name and called him by name; that he had traded watches with him; that he had met the defendant on the street from time to time and talked with him there; and that he had talked with him altogether from twelve to fifteen times.

During the argument to the jury the state's attorney made the statement set forth in the specification of error, and at the time the statement was made the counsel for defendant excepted to the statement, which exception was allowed by the court. No objection was taken to this statement other than the exception, nor was the court asked by the defendant to reprimand the counsel, nor did the defendant ask from the court any instruction to the jury to disregard this statement. In the charge to the jury, however, the court referred to this matter as follows: "Now, an exception has been taken by one of the counsel of

the defendant, to certain remarks made by the state's attorney in his address to you. Now, if Mr. Shirley, in his argument here, has made any statements that are not warranted by the evidence in the case, it is your duty to wholly disregard such statements. Any statement that Mr. Shirley made, if he did make any statements that are not fully warranted by the evidence, you should wholly disregard in arriving at the verdict."

The defendant claims that the statement made by the state's attorney hereinbefore quoted is of such prejudicial character as will require this court to reverse the judgment of the lower court. It will be noted that it is not alleged that the trial court made any error in the case. No complaint is made of any ruling of the court in this matter, nor of any failure of the court with reference thereto. Distinction must be drawn between legitimate comment by counsel upon the evidence of the case and the independent testimony of the counsel. The right of argument on the testimony is one which exists in the trial of cases in our courts, in order that each side represented may, as fully and fairly as possible, present the facts, so that the truth may be ascertained. In doing this the largest and most liberal freedom of speech is allowed. Counsel has a right to impugn, justify, or condemn motives, basing his argument, of course, upon the evidence. He has a right to argue to the jury the credibility of the witnesses, and if a witness has been shown to have testified falsely, he has a right to call the attention of the jury to this fact.

Of course, there are and must be limitations to this freedom of speech, and no counsel should ever forget his duty to the court in the administration of justice, but should conduct his case with dignity and courtesy. When he occupies the position of state's attorney, his relation to the administration of justice is more pronounced. Justice to the state and the defendant should be his sole aim, and in the prosecution of his cases he should refrain from mere personal abuse. Yet he has the right within reasonable limits to denounce actions and motives of witnesses on the stand, when such denunciations can fairly be inferred and drawn from the evidence in the case. It is not every extravagant statement that is prejudicial, and the mere fact that an inference from the evidence may be illogical or erroneous does not necessarily establish that his statement thereby became prejudicial. There is evidence in this case from which the counsel could fairly infer that

the defendant perjured himself. The witness for the state swore to the commission of the crime; the defendant denied it. Under the testimony, if the witness for the state be correct, then the defendant did perjure himself, and carried bottles of beer around in his pockets on the streets of Aneta within the time specified. The defendant relies upon the ruling of this court in the case of the State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71. In that case the court says that the statement made by the attorney "was not comment upon the evidence, but was the independent testimony of the attorney." The court says that there is no evidence in the record with reference to the statement made by the attorney. The defendant was being tried for the offense of rape, and the counsel for the state urged conviction "in view of the fact that you (the jury) have before you two girls whose lives have been ruined by this defendant." There was no evidence of this in the case, and therefore the attorney was clearly guilty of indulging in independent testimony. In the case at bar the language is strong, but it is based upon the testimony, and we cannot see that it transgresses the rules of legitimate comment. Another serious objection to this specification is that no error of the court is assigned with reference thereto. In his charge to the jury the court called the attention of the jury to this statement, and the exception taken thereto, and specifically instructed the jury with reference to it. No further instructions were asked, nor was the court asked, even orally, to caution the jury or to reprimand the counsel. The court, of course, cannot anticipate that the counsel will make improper remarks, and if improper remarks are made, they should be promptly objected to and a ruling thereon sought. If the court overrules the objection, exception can be saved to the ruling and the matter presented for review. The rule is laid down in 1 Thompson on Trials, 745, that such an irregularity on the part of counsel "can only be saved for appellate review by an objection seasonably made, and exception properly taken if it is overruled, which exception is incorporated in the bill of exceptions." The same rule is set forth in 12 Cyc. 585; see also 5 Enc. L. & P. 377-381. In State v. Abrams, 11 Or. 169, 8 Pac. 327, the court, in effect, says that the error alleged must be the error of the court. We quote: "Some of these remarks . . . were undoubtedly improper, and can hardly be condemned with too much severity. But, however reprehensible, there is one insuperable obstacle to their being considered here as

ground for reversal. They involve no error of the court below." To the same effect is *Bradshaw v. State*, 17 Neb. 147, 152, 22 N. W. 361, 363, 5 Am. Crim. Rep. 499, where the court says: "Before a case can be reversed and a new trial ordered it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling had upon the objection."

In *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432, the counsel for the state was guilty of using language for which there was no warrant in the testimony. The court says in this case: "We realize that allowance must be made for intemperate and unfair allusion by zealous counsel, engrossed in the trial of an action, but the language here used exceeded the bounds of legitimate argument, should not have been indulged in, and may, as the counsel now insist, have been prejudicial to their client. But admitting all this, the record shows that the defendant's counsel did nothing more than to except to the remarks when they were made, while the only assignment of error in reference thereto is that the court erred in permitting the argument to proceed without reprimanding the attorney for using such language. The trial court was not called upon to make a ruling of any kind. It did not decline to completely and thoroughly cover the error by an instruction. The only complaint is that it did not, of its own volition, interrupt and reprimand the counsel while engaged in his argument. The court was not at any time requested to make a ruling whereby the impression which the defendant's counsel now claims may have obtained with the jurors, to her prejudice, by reason of the unwarranted comment upon her conduct, might have been corrected. This should have been done, either at the time the objectionable words were used, or when the court came to its charge to the jury. The exception to the remarks of the public prosecutor, although coupled with the alleged error of the court in failing to reprimand him at the time of the occurrence, is insufficient. It does not properly present the question which has been argued."

In *People v. Shears*, 133 Cal. 154, 65 Pac. 295, the attorney for the state was clearly guilty of using independent testimony in his argument, but the court refused to reverse on that ground, stating that,

although the remark was improper, the defendant did not invoke any action of the court thereon, but contented himself with excepting to the remarks of the counsel.

In *Rains v. State*, 137 Ind. 83, 36 N. E. 532, the court lays down the rule that the defendant, who urged misconduct on the part of the counsel for the state as a ground for reversal, must, to avail himself of such ground, ask relief from the trial court to properly admonish the jury or to reprimand the counsel, etc. See also *Pearl v. State*, 43 Tex. Crim. Rep. 189, 63 S. W. 1013, 1017; *Earl v. People*, 99 Ill. 123, 136.

In *Ethridge v. State*, 124 Ala. 106, 27 So. 320, the court reversed the judgment because the counsel for the state had transcended the bounds of legitimate argument, but in that case the objection to the remarks "was properly and seasonably brought to the court's attention, and its ruling invoked thereon by the request on the part of the defendant, made after the close of the argument, for an instruction calling attention to the argument, and . . . [that it] was not a matter upon which the solicitor could legitimately comment." We are of the opinion that the defendant cannot avail himself of the alleged misconduct of the attorney for the state. We adhere to the rule laid down in *State v. Nyhus*, supra, that the counsel must confine himself to legitimate comment on the testimony, and must not give independent testimony in his argument. It cannot be said here, however, that the counsel for the state did not have some basis in the testimony upon which he could found his statement, and in any event, it was the duty of the defendant to request the trial court to give proper instructions thereon, and failing so to do, he cannot now be heard to complain.

The judgment appealed from is affirmed.

MORGAN, Ch. J., not participating; A. G. BURR, Judge of the Ninth Judicial District, sitting in his place by request.



## THE STATE OF NORTH DAKOTA v. CORNELIUS GOETZ.

(131 N. W. 514.)

**Jury — Challenge for Cause — Waiver.**

1. Failure to exercise a peremptory challenge is a waiver of previous objection to a juror to whom a challenge for cause had been taken and disallowed.

**Criminal Law — New Trial — Challenge to Juror — Waiver of Objections.**

2. Before a new trial will be ordered because of an erroneous or prejudicial ruling of the trial court in denying a challenge for cause, the record must affirmatively show that all peremptory challenges allowed by law to the defendant had been exercised, and that for such reason he was unable to remove by peremptory challenge such objectionable juror.

**Criminal Law — Objections to Evidence.**

3. The trial court properly sustained objections to certain hypothetical questions, there being no evidence upon which to base the expert testimony offered.

**Bastards — Instructions — Burden of Proof.**

4. *Held*, that the court did not, in its instructions, misplace the burden of proof, and that defendant was not entitled to a new trial because of the nonappearance of a witness under subpoena.

**Bastards — Evidence — Sufficiency.**

5. Evidence examined, and *held* sufficient to sustain conviction.

Opinion filed May 6, 1911. Rehearing denied May 29, 1911.

Appeal from District Court, Pierce county; *Burr*, Judge.

Cornelius Goetz was convicted of crime, and appeals.

Affirmed.

*John O. Hanchett*, for appellant.

*B. L. Shuman*, for respondent.

Goss, J. Defendant appeals to this court from a judgment entered on a verdict in the district court of Pierce county, in which he was adjudged to be the father of a child born to an unmarried woman of that county. The proceeding was a prosecution under the bastardy statute.

Error is assigned on the court's denial of a challenge for actual bias, interposed by the defendant to one of the jurors who acted as such on

the trial. It is not necessary to review the ruling of the trial court in this particular. The record fails to disclose prejudicial error, it not appearing affirmatively that the defendant, at the time of the ruling complained of, had exhausted his peremptory challenges allowed by statute. Though the court erred in its ruling of the *voir dire* of a juror, the defendant not having exhausted his peremptory challenges, passed peremptory to the panel, thereby accepting the jury while having it in his power to have removed the objectionable juror, he, by failing to remove him, waived the objection formerly interposed, and likewise the court's erroneous ruling thereon, granting that the same was such. The privilege of challenging a proposed juror is dependent upon and conferred by statute, and is not a constitutional right, and may be waived even in capital cases.

Queenan v. Territory, 11 Okla. 261, 61 L.R.A. 234, 71 Pac. 218, affirmed on appeal in 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762; see also Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258; Kohl v. Lehlback, 160 U. S. 293-301, 40 L. ed. 432-435, 16 Sup. Ct. Rep. 304; Raub v. Carpenter, 187 U. S. 159, 47 L. ed. 119, 23 Sup. Ct. Rep. 72.

And the failure to object to a collected jury waives all questions improperly excluded on *voir dire* and all matters of irregularity occurring during the impaneling of such jury, and a party failing to challenge waives thereby all irregularities in the impaneling of a jury; and this rule applies to all rulings of the court on the question of competency of jurors.

Flynn v. State, 97 Wis. 44, 72 N. W. 373; Emery v. State, 101 Wis. 627, 78 N. W. 145; Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; Raub v. Carpenter, 187 U. S. 159, 47 L. ed. 119, 23 Sup. Ct. Rep. 72; Cornell v. State, 104 Wis. 527, 80 N. W. 745; Brinegar v. State, 82 Neb. 558, 118 N. W. 475; Queenan v. Oklahoma, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762; McNish v. State, 47 Fla. 69, 36 So. 176; Webster v. State, 47 Fla. 108, 36 So. 584; Lindsey v. State, 111 Ga. 833, 36 S. E. 62; Adams v. State, 99 Ind. 244, 4 Am. Crim. Rep. 309; State v. Carpenter, 124 Iowa, 5, 98 N. W. 775; State v. Furbeck, 29 Kan. 532; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Reed v. State, 75 Neb. 509, 106 N. W. 649; O'Rourke v. Yonkers R. Co. 32 App. Div. 8, 52 N. Y. Supp. 706; Goad v. State, 106 Tenn.

175, 61 S. W. 79; *Morse v. Montana Ore Purchasing Co.* 105 Fed. 337, 12 Decen. Dig. 206; 24 Cyc. 320; and numerous authorities cited. "It was his (defendant's) duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict, and then set up that *he had not waived his rights.*" *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762.

Defendant urges that the evidence is insufficient to sustain the verdict of guilty. It is unnecessary to detail the evidence, for so to do would serve no good purpose. Suffice it to say that the birth of the child to an unmarried eighteen-year-old Russian girl is admitted. Much of the testimony, including that of the prosecutrix, was elicited through the use of interpreter. Her woeful ignorance stands out in bold relief throughout her testimony. She does not even know her own birthday. It is apparent also that she was reluctant to lay bare to the jury the whole truth as to her conduct with the defendant, and as to some circumstances her testimony is accordingly somewhat indefinite; but the actual facts necessary to convince us of the justice of the verdict are equally apparent in all the testimony, including that offered by the defendant himself. The prosecutrix is corroborated in essential and important details by the testimony of the defendant's father and defendant's brother-in-law, as well as by the brother of prosecutrix. Also defendant is contradicted and impeached in several instances in material portions of his testimony by other witnesses than the prosecutrix. The jury were fully justified in their finding that the defendant is the father of said child.

Defendant complains of leading questions having been asked of the mother during the trial. The permitting of examination by the use of leading questions is largely in the discretion of the trial judge who hears the testimony, sees the witnesses, and can fully comprehend the necessity or want of necessity for such method of examination, and accordingly the discretion of the trial judge as exercised in such particulars will not be disturbed excepting for gross abuse plainly resulting to the prejudice of the defendant. This rule is so well established as to need no citation of authorities in its support. In the instant case the ignorance of the prosecutrix, the circumstance unusual to her of being obliged to relate matters to her own shame in a public court room, show sufficient cause for sanctioning the method of examination alleged as error.

During the trial, acting upon the supposition that a foundation was laid, certain hypothetical questions were propounded to a physician as an expert witness. From a careful reading of the record we are satisfied that no sufficient foundation was laid prior to the offer of such testimony. Defendant sought to establish pregnancy by proof of cessation of the menses of prosecutrix a month or more before the date fixed by her as the probable time of conception. The testimony as to this is so indefinite and vague that the jury could not therefrom have found such condition to exist. The only definite testimony relating to this matter was, on the state's motion without objection by the defendant, stricken out, the court in such ruling stating that he would give defendant a chance to offer further proof along the same line, and opportunity to establish such fact if defendant so desired. The only testimony thereafter offered was sought from a person who had acted as interpreter for prosecutrix at the time she consulted a physician some months previous to the birth of her child, and such testimony does not show whether the cessation of menses was in February, or whether her last menses were in February, prior to the last of March or first of April, alleged as the date of intercourse with the defendant, granting that the proof is definite enough to permit a contention that she made such a statement. This testimony is too meager upon which to admit the expert testimony offered. Granting, however, that such testimony was admissible, it would be but corroborative of the testimony of the prosecutrix wherein she testified, during her direct examination, to several acts of intercourse with the defendant during the month of March, previous to the time of last intercourse, about April first. In her cross-examination she changed her testimony, denying all acts of intercourse excepting one, and fixed this act of intercourse as having taken place on April 1st, eight and one-half months prior to the date of her child's birth. The jury could have concluded from the testimony that she had intercourse with the defendant at other times, or at an earlier date, than the single instance upon which she finally relied. The action of the court in excluding this testimony was proper; but if conceded to be error, under all the testimony we fail to see how the rights of the defendant were prejudiced thereby.

Defendant's counsel excepts to certain remarks of the court made during the course of the trial, and urges the same as error. The remarks were occasioned by a question asked by defendant's counsel, to

which the remarks were but an answer. The remarks could not be prejudicial, and were but a concise statement of the issues, more fully explained thereafter by the court in its charge to the jury.

The last assignment of error is based upon the instruction of the court, the defendant claiming that the court misplaced the burden of proof in the instruction to the jury upon which such error is assigned. The instructions so excepted to were given at the close of a full and comprehensive instruction covering law and fact involved, and were intended by the court merely as a statement of the form of the two verdicts. In this respect the court instructed the jury that "two verdicts will be given you in this case, one reading, 'We, the jury, in the above-entitled case, find the defendant, Cornelius Goetz, to be the father of the bastard child born to L. M.' If, after examining all the evidence, you can fairly and conscientiously say that the preponderance of the evidence is in favor of the state, that is, you believe the weight of the evidence shows Cornelius Goetz begot this child on or about the 1st day of April, 1907, then you should bring in this verdict."

"The other verdict will read: 'We, the jury, in the above-entitled case, find the defendant, Cornelius Goetz, not to be the father of the bastard child born to L. M.' If upon examination of all the evidence, you find this to be the case, then it will be your duty to bring in this verdict."

To these instructions given orally, the defendant, within the period allowed, filed exceptions, claiming that the burden of proof was misplaced, and that the jury, to find the defendant not guilty of the charge, had to find affirmatively by a fair preponderance of the testimony that he was not the father of the child in question. In this connection no special significance can be placed upon the use of the word "find" in the instructions relating to the verdict of not guilty. In the ordinary criminal verdict the jury *find* the defendant not guilty because his guilt is not established, and therefore by verdict they affirmatively find as a fact his absence of guilt. This verdict is the equivalent to finding that the defendant is not guilty, and the equivalent to the negative statement by the jury that the defendant is not the father of the child. And the same argument could be made as to such expression that could be made to the use of the word "find" in a verdict of not guilty. In either case it is a finding of not guilty, because of either absence of proof of guilt or actual proof of innocence. It cannot be inferred from the mere

use of the word "find" that the burden of proof was thereby changed and placed upon defendant. The instruction given after the first form of verdict above recited was a proper statement of the law, as only a fair preponderance of proof is necessary to warrant a conviction in this class of cases, it being in this respect, as in many others, a civil action. But this was not the only instruction given by the court on the burden of proof. Preceding the instructions above quoted the court gave the following instruction to the jury: "The state is required to prove its case to your satisfaction by a fair preponderance of the evidence. By the term 'preponderance of the evidence' we mean the greater weight of evidence." Then the court in detail took up each statement contained in the complaint, and instructed the jury that they must find the truth of such statements by a fair preponderance of all the evidence in the case before the verdict first above quoted could be returned by them, particularly calling to the attention of the jury that the complaint charged the defendant with being the father of the child in question. And if the jury followed the court's instructions, as presumably they did, before finding defendant guilty they must have found he was the father of the child of prosecutrix by and under a fair preponderance of all the evidence in the case. The very fact that no exceptions were urged to the charge other than to the isolated portions referring to the form of the verdicts signifies that defendant was satisfied with the general charge. And the charge, taken altogether, amply protected all rights of the defendant. This assignment of error urged cannot be sustained.

Defendant urges as grounds for a new trial the nonappearance of a witness under subpoena to appear in defendant's behalf, which witness failed to appear on account of the weather and her being ill *en route* from her home to the place of trial. The record fails to disclose that any postponement of the trial was asked, or that the absence of the witness was even called to the attention of the trial court. That the trial continued over two days, and that defendant rested his case without making it known to the court that any witness was absent and without requesting a continuance. Such witness was a midwife, who attended prosecutrix during her confinement. The affidavit of this absent witness was thereafter filed and considered on the motion for new trial. The affidavit fails to disclose that such witness could give any testimony material to the case or tending in any way to establish a

defense. In fact the affidavit wholly fails to disclose what the testimony of such witness, if called, would be. It recites that she was present when the child was born and knew its condition, and then follows a rehearsal of her reasons for not being present in obedience to the subpoena. It is true that counsel for the defendant has in his own affidavit recited on information and belief facts tending to supplement said absent witness's testimony, but it is noticeable that the witness herself has carefully refrained from stating in her affidavit her knowledge of the matters so mentioned by counsel on information and belief. And besides, the testimony of the midwife, if she could testify as counsel has stated she would, would be but cumulative. The trial court properly denied the motion for a new trial.

This disposes of all assignments of error taken by the defendant, and accordingly the judgment is ordered affirmed.

MORGAN, Ch. J., not participating.

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## EDWARD WESTBY v. J. I. CASE THRESHING MACHINE COMPANY.

(132 N. W. 137.)

### **Sales — Contract — Delivery — Subsequent Agreement — Rescission.**

1. Plaintiff signed a written order for the purchase of a threshing machine of defendant. On its arrival plaintiff could not give security for its purchase price in compliance with the order, and delivery was not made. Defendant's agent for purposes of delivery and collection then sold plaintiff the machine under an oral contract at a reduction for cash, the machine to be tried and if not satisfactory returned, and pending trial the cash price was deposited with such agent. The machinery proved worthless. The agent transmitted the money to the defendant, who retains it. Plaintiff rescinded the oral contract of sale and recovered judgment for the amount paid, including freight.

*Held*, the delivery under the oral contract was not a delivery of the machine under the written order, notwithstanding that such order by its terms for bade the agent substituting a new contract of sale therefor, and that the machine was delivered under a new and independent oral contract of sale.

**Sales — Acceptance — Delivery for Trial — Rights of Purchaser — Agent's Authority.**

2. That under the oral contract plaintiff had the right to test such machinery by trial, and its acceptance for such purposes was not an acceptance under the written order, even though the company's agent had no authority to make an oral contract of sale, or permit such trial before acceptance of the machinery.

**Sales — Principal and Agent — Ratification — Acceptance of Consideration.**

3. Where the machinery is delivered under a new and independent oral contract of sale, under which the company receives a purchase price on such a sale, made by an agent in excess of the agent's authority, the company as principal must disaffirm the unauthorized sale, or they will be held to ratify the agent's acts and such sale under the oral contract.

**Sales — Rescission — Subsequent Oral Agreement — Construction.**

4. Where, after rescission of such an oral contract, action is brought by the purchaser to recover the purchase price, a written executory contract between the parties made prior to the executed oral contract, but under which written contract no delivery was ever had, the written warranties, and conditions as such, are not parts of the oral contract, unless made so by the terms of such oral contract itself; the executed oral contract entirely superseding in such particulars, as well as all others, the prior written executory contract. Therefore the written contract and the warranties therein contained, and the conditions provided under which it might be rescinded, including manner of rescission, are not parts of the oral contract, and can constitute no defense to an action for the purchase price based on rescission of the oral contract of sale, when delivery was had under such oral contract.

**Sales — Rescission — Pleading — Election — Practice.**

5. Plaintiff's complaint was prepared to permit proof of either a written contract of sale with rescission as provided for in such written contract, or to permit proof of an oral contract of sale and rescission thereof. Where no motion is made in advance of or on trial, to compel plaintiff to elect under which contract of sale he will submit proof, plaintiff has the right of choice. and may, as in this case, rely upon and prove such oral contract. The fact that plaintiff gave notice of rescission in the same manner provided in the written contract, and plead such rescission, does not of itself estop plaintiff from relying on the oral contract, where such notice is not inconsistent with a rescission of such oral contract.

Opinion filed May 27, 1911.

Appeal from District Court, Benson county; *Cowan*, Judge.

Action by Edward Westby against the J. I. Case Threshing Machine Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*H. R. Turner*, for appellant.



Limitations upon an agent's authority, known to those dealing with him, are binding upon all. *David Bradley & Co. v. Basta*, 71 Neb. 169, 98 N. W. 697; 31 Cyc. \*1329; *Seymour v. Wyckoff*, 10 N. Y. 213; *Cobb v. Dows*, 10 N. Y. 335; *McCracken v. San Francisco*, 16 Cal. 591; *Billings v. Morrow*, 7 Cal. 172, 68 Am. Dec. 235; *Dean v. Bassett*, 57 Cal. 640; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902; *Golinsky v. Allison*, 114 Cal. 458, 46 Pac. 295; *Nichols v. Bruns*, 5 Dak. 28, 37 N. W. 752; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572; *O'Shea v. Rice*, 49 Neb. 893, 69 N. W. 308; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388.

Failure to comply with written contract bars respondent from claiming breach of warranty. *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826; *Trapp v. New Birdsall Co.* 109 Wis. 543, 85 N. W. 478; *Heagney v. J. I. Case Threshing Mach. Co.* 4 Neb. (Unof.) 745, 96 N. W. 175; *Aultman & T. Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859; *Fahey v. Esterley Mach. Co.* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580.

*I. C. Davies and Buttz & Sinness*, for respondent.

One acting without notice as per contract waives the notice. *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335; *Fahey v. Esterley Mach. Co.* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145; *Briggs v. M. Rumely Co.* 96 Iowa, 202, 64 N. W. 784; *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* 97 Iowa, 148, 59 Am. St. Rep. 399, 66 N. W. 96; *Peter v. Plano Mfg. Co.* 21 S. D. 198, 110 N. W. 783; *Baker v. Nichols & S. Co.* 10 Okla. 692, 65 Pac. 100; *Nichols & S. Co. v. Wiedemann*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41.

The machine not having been accepted under the written order, agent could make a new oral agreement. *Colean Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614; *Nichols & S. Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136; *Hicks v. Aultman Engine & Thresher Co.* 108 Minn. 327, 122 N. W. 15.

Notice in contract limiting agent's authority was not binding on Westby. *Olson v. Aultman Co.* 81 Minn. 11, 83 N. W. 457; *Gaar, S. & Co. v. Patterson*, 65 Minn. 449, 68 N. W. 69; *First Nat. Bank v.* 21 N. D.—37.

Dutcher, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497; Peter v. Plano Mfg. Co. 21 S. D. 198, 110 N. W. 783; Pitsinowsky v. Beardsley, 37 Iowa, 9; D. M. Osborne & Co. v. Backer, 81 Iowa, 375, 47 N. W. 70; Blaess v. Nichols & S. Co. 115 Iowa, 373, 88 N. W. 829; Canham v. Plano Mfg. Co. 3 N. D. 229, 55 N. W. 583; Nichols & S. Co. v. Paulson, 6 N. D. 400, 71 N. W. 136; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614.

Goss, J. This action was brought to recover the purchase price paid defendant for a Case threshing machine separator, with attachments of wind stacker, feeder, band cutter, and weigher, in all of which plaintiff paid defendant on receipt of said machinery, on October 2d, 1905, including freight, the sum of \$1,064.75.

Plaintiff's complaint alleges the sale to him by the defendant of the foregoing articles of machinery, forming a complete threshing machine; that they were of the make and manufacture of the defendant company, and by them made and manufactured for sale, and sold to plaintiff to be used for the purpose of threshing and separating grain, and were for that purpose purchased; that said machine was warranted as an inducement to the purchase thereof and as a part of the consideration therefor; "that the said threshing machine was properly constructed of good material, and was fit for the purpose for which it was made and manufactured and offered for sale, and for the purpose for which it was sold to the plaintiff, that is, to use for the threshing and separating of grain, and that the said threshing machine would do good work when used for that purpose;" that said machine would thresh and separate grain to the satisfaction of the plaintiff; and that should such machine fail to thresh and separate grain to the satisfaction of the plaintiff, that it could be returned to the defendant and the purchase price would be refunded plaintiff; that such agreement was inducement to plaintiff to enter into such contract of sale, and was a part of the consideration therefor. That, relying upon these representations and warranties, the plaintiff bought the threshing machine and paid defendant as the purchase price the sum aforesaid, and the threshing machine was delivered him. That the threshing machine was poorly constructed of defective material, and not fit for threshing and separating grain; that it was of faulty construction; that defective material was used in its construction; that it continually broke down in its vari-

ous parts and clogged up, and wholly failed to do good work as a threshing machine, in the threshing and separating of grain; and wholly failed to comply with said warranties, under which it was sold.

As soon as plaintiff discovered the defects so ascertained by tests of the machinery, he notified the defendant company, by registered letter addressed to it at Racine, Wisconsin, of the failure of the machine to conform to the warranties under which it was sold, and of his rescission of the contract of sale; and immediately thereafter redelivered the threshing machine to defendant's agent upon the right of way at Maddock, where such machine had been purchased and received by this plaintiff from the defendant. That such return was made on or about October 17, 1905, and on said date defendant was notified thereof by registered letter addressed to it at Racine, Wisconsin; that ever since said machine has been in the possession of the defendant; that upon the return of the rig the plaintiff demanded the payment to him by the defendant company of the amount sued for, the purchase price and freight aforesaid, with which demand defendant has refused to comply.

Defendant, in answer to plaintiff's complaint, admits the sale and receipt of the money and delivery of the machinery, but alleges the sale thereof was under a written contract consisting of a written and printed order signed by plaintiff and accepted by defendant, and pursuant to which the machinery was delivered. That under said written contract defendant warranted said machinery to be of good quality and workmanship, durable under good care, and able to do good work under ordinary conditions; and recites at length the order and warranty under which the defendant company alleges the machinery was sold to plaintiff.

The trial was had to a jury, plaintiff recovering judgment for the full amount sued for.

Defendant claims that plaintiff by his pleadings has relied upon the written contract and performance thereunder, and that proof of an oral contract is without the pleadings and beyond the issues joined under them. In this conclusion we cannot agree with appellant. Contrary to his contention, the complaint alleges the sale to have been made at Maddock, North Dakota, on October 3, 1905, of a complete threshing rig, and sold under an express warranty, with subsequent breach thereof,—all set forth in detail.

It is true that defendant as to the oral contract pleads a rescission with notice thereof by registered letter to the company's office at Racine, Wisconsin, but in the same connection he pleads that the machine was purchased at Maddock, North Dakota, and for the sum actually paid by the deposit and freight. It is not until we inspect the answer that any written contract or terms thereof are found in the pleadings in the case; and it is only from the proof that we discover that the written contract was executed at Fargo, North Dakota, in September, while the oral contract, upon which it is plain the suit is brought, establishes a transaction on October 2d, at Maddock, with the machinery at such place. It is noticeable that the complaint does not mention a written contract. Plaintiff by his pleadings avoided limiting his proof. Appellant's contention that plaintiff has sued on the written contract is incorrect.

Upon the trial the facts stand undisputed; briefly recited they are set forth in the following statement: On September 28, 1905, plaintiff, after having been solicited by one Cooper acting as sales agent for defendant company, to purchase this machinery, signed the usual threshing machine order or contract of purchase of the same in the defendant company's office at Fargo, North Dakota. The order provided that the plaintiff as purchaser would receive at Maddock, North Dakota, such machinery on its arrival, and pay therefor the freight to said point and the further sum of \$1,070, by executing three notes, due October 1st, 1906, 1907, and 1908, respectively, aggregating said amount, and secure the notes by a first mortgage on the machinery sold and also a first mortgage on a Reeves engine and tank owned by plaintiff, "and failing to pay said money or execute and deliver said notes and mortgage, this order shall, at the company's option, stand as purchaser's written obligation, and have the same force and effect as notes and mortgage for all sums not paid in cash, and shall discharge the company from all warranty." Said order further provided that the machinery was purchased upon and subject to the conditions printed in the order, and none other, which conditions consisted of the warranty as pleaded in the answer. The order also provided that after a trial of ten days by the purchaser, if the machinery should fail to conform to the warranty, written notice should be given to the defendant company at Racine, Wisconsin, and also to the agent from whom received, stating in what parts and wherein it

failed to fulfill the warranty, and a reasonable time thereafter was to be given the company to send a competent person to remedy the difficulty and for replacement of any defective parts. The order stipulated for a second notice of defective working of any parts so replaced, and for further substitution therefor at the option of the company, and that the failure to give notice should absolve the company from liability under the warranty; and providing that every article was sold for a specified sum named in the order, and that the contract for sale was as to each article sold, a divisible one; that failure to settle on delivery of the goods ordered under the contract, or any change in the printed terms of the warranty by any person whomsoever, agent of the company or otherwise, by addition or waiver, or any abuse, misuse, or any exposure of the machinery, would discharge the company from all liability whatever, and that no representation made by any person as an inducement to obtain the order for purchase should bind the company, the purchaser waiving notice of the acceptance of the contract by the company; that any failure to secure the notes as contracted in the order, or failure to pay the same, should constitute a full release of all warranty. A further proviso was contained in the contract to the effect that the purchaser in case of crop failure could cancel the contract upon payment of 10 per cent of the purchase price, or that, in case he should decline to accept such machinery, he should first pay the freight and 10 per cent of the purchase price, this "as compensation to the company for soliciting, investigating, and taking of the order." Embodied in the order and printed in large type was the following: "This order must be signed by all parties before delivery of goods; it is taken subject to approval, and is to be sent to the company for acceptance or rejection. No person has any authority to waive, alter, or enlarge this contract, or to make any new or substituted or different contract, representation, or warranty. Mechanics and experts are not authorized to bind the company by any act, contract, or statement." This order was signed by the plaintiff at Fargo, on September 28th, in the presence of the agent Cooper, designated in the order as the salesman. At the time the order was signed and delivered by plaintiff to the company, it had a paragraph attached providing a discount for cash payment of the contract price, which was not filled out, but was thereafter, by the company or its agents, unauthorized by the plaintiff, completed to read as follows: "If all notes herein described are fully

paid in cash on or before November 1, 1905, a discount of \$97.50 will be allowed." The order, with the exception of this provision, was written in ink, and this provision thereafter penciled in; but the copy of the order delivered plaintiff remained in blank as to date and amount of cash discount.

The undisputed testimony establishes that the company shipped the machinery under the order to Maddock, it arriving there August 2, 1905; it being accompanied by the sales agent, Cooper. On its arrival it developed that the threshing engine which, under the terms of the order, was to be given as security with the property sold, was already mortgaged, and on account of the serious illness of the person to whom payment would be made, and who was obliged to discharge the mortgage, its discharge could not be obtained, and plaintiff could not comply in such respect with the terms of the order; the defendant, by its sales agent, refused to deliver the machine until security in strict conformity with the order was given. Plaintiff offered to deposit \$1,200 worth of wheat tickets as additional security that he would procure the discharge of the mortgage, which offer was refused; said wheat tickets were then refused to be taken in lieu of the mortgage; the sales agent insisted upon exact compliance with the terms of the order. Thereupon plaintiff was unable to purchase the machinery under the order, and the machinery was not delivered. Thereafter plaintiff made, and the agent accepted, a cash offer for the machinery, plaintiff offering to buy the same for cash if the defendant would warrant the machine and permit plaintiff five days' trial of it, that he could satisfy himself that it would run and do good work and stand up under strain, on the condition that if it would not he was to return the machinery to the defendant and get his money back. The money to be deposited would become the purchase price of the machinery, and if it proved satisfactory and did good work on such trial, plaintiff would keep it. The parties then negotiated as to where the money should be deposited, plaintiff desiring to deposit the money in a bank at Maddock, but Cooper objected to such "one-horse banks," and insisted that the money be deposited with the Case company, which he explained was "a much safer and stronger concern." This independent deal was closed by the plaintiff paying the agent Cooper \$970 in cash, a discount of exactly \$100 from the price mentioned in the order, and in addition thereto plaintiff paid the freight amounting to \$94.75,—a total payment of \$1,064.75,—under

the condition that the money was deposited with Cooper pending the trial of the machinery by five days' use thereof, which machinery was to be tested by such use by plaintiff, and upon his being satisfied therewith was to be kept by him; and in case of its failure to do the work for which it was purchased, it was to be returned at Maddock, and he should receive his deposit and freight money back from the agent Cooper, who in the meantime was to assist plaintiff in operating the rig, and act as a machinery expert in getting the same to do satisfactory work.

Upon trial the machinery proved defective in workmanship, design, and material, and utterly worthless as a threshing machine. Plaintiff and the agent Cooper worked with it for four days, during which time the rig thoroughly demonstrated its worthlessness. The evidence is that the machine could not be made to do the work for which it was sold, because of many reasons set forth in the testimony. Finally Cooper told Westby, "if it don't work to-morrow you can pull it in and get your money," and immediately disappeared between two days, with Westby's money, leaving Westby with the machine on his hands. Westby immediately registered a letter to the company at their head office, at Racine, Wisconsin, to the effect that "you are hereby notified that the steel separator 40 x 60, which I purchased of you on the 28th of September, 1903, has failed in quality of material and workmanship to fulfil the warranty given by you, and said separator is subject to be returned at once." Which letter was dated at Maddock and signed by plaintiff. Its receipt was entirely ignored by defendant company, although the return card shows such notice was received on October 12th by the defendant company at Racine, Wisconsin. On October 18th following, plaintiff registered a second letter to defendant company at Racine, Wisconsin, as follows. "I notified you some time ago that the steel separator purchased of you failed to fulfill your warranty. I also notified your local agents here, L. E. Foss and C. L. Cooper, but they didn't do anything; and I can't do anything with that separator, so I have hauled it in to Maddock, North Dakota, and have got another separator. I request you to refund my money and fix this up at once." This letter was also signed by plaintiff. This letter was followed by one from the company denying receipt of the first letter sent within the ten-days' period mentioned in the order, to which plaintiff replied referring to his letter of October 18th, demanding a refund

of his money and that the matter should be fixed up at once. No results following, this suit is brought, some years afterwards, to obtain the purchase price deposit and freight payment aforesaid.

The defendant company throughout the trial insisted that it was not bound by the unauthorized act of its agent Cooper, in his making the unauthorized sale; that it had never ratified the same; that the company had made the delivery under the written order, and had no knowledge of any other sale; that knowledge was imputed to the plaintiff by the terms of the order that no agent of the company had authority to change the order in any respect, or to deliver the goods until the order was signed and a settlement effected under the order and pursuant to the terms thereof; that its agent was but a sales agent, and that plaintiff had knowledge of his limited authority.

When confronted with the fact that the settlement had been for cash, admitted by the pleadings to have been received by the company, and for a different amount than was specified in the order, the company offered the original contract with the penciled discount provision therein, that it might be assumed that it had supposed the amount remitted was approximately the amount due under the contract, provided the plaintiff had availed himself of the cash discount by making cash payment,—to the effect that the receipt of such money should not be presumed a ratification by the company of the contract actually made by the agent to the plaintiff. The trial court submitted to the jury, under proper instructions, the question of whether the delivery of the machinery was made under a new contract of sale, made orally between plaintiff and the agent Cooper at Maddock, or whether delivery was made under the written order; and the jury found the delivery was made under the former, thereby eliminating from consideration the contract evidenced by the order. And the jury was justified in so finding. It is doubtful if there was any issue of fact in such respect for the determination of the jury. The proof was conclusive that the buyer did not receive the property under the written order, which contract as evidenced thereby remained wholly executory, and the party who had in part performed thereunder, the company, refused further performance. The agent would not deliver the machine until security as contracted for in the order was given, and evidently for some reason best known to himself refused to allow the order to be modified in any particular. The performance of the contract then was



rendered impossible. A new contract was made between the agent and the purchaser, the property in the meantime remaining the property of the company. Under the written contract no delivery was ever made, hence no title over passed thereunder. In fact, under the new and substituted contract the machinery remained the property of the defendant, and thereunder title never passed. The money was deposited with the agent assuming to act for the company, instead of in a bank, but the money still remained, until the machine proved satisfactory, the property of this plaintiff. Had the agent embezzled the money, the company could have disaffirmed the unauthorized act of the agent and retained its machinery, as title to it never left the company. It was at the most but an agreement for sale for which the buyer could likewise, for breach of warranty, rescind the agreement. See Rev. Codes, 1905, § 5435. And the evidence shows the same was presumably done, and notice of rescission given the company, and the obligations of plaintiff from the sale to take the machinery terminated, with plaintiff's money, the subject of this action, in defendant's possession.

Defendant insists that no agent of the company had the right to make a new or substituted contract, or to alter or change the written one. This may be true; it does not affect the situation disclosed by the evidence. The parties acted under the oral contract, if at all, as no performance was had under the written one. In fact the oral contract amounted to no more than the written one, a mere contract of sale uncompleted by conditional delivery only. Nor does the act of the plaintiff in refusing to complete the written contract of sale result in its completion. The liability he would assume would be, in the absence of contract, liability for an action for damages. In the contract itself we find the measure provided for such liability. But in this action the company is not counterclaiming thereon, but instead stands or falls upon delivery or nondelivery under the written order. The right of the plaintiff to avoid the written contract is a right recognized by the fact that the contract itself has fixed and provided for a measure of damages in such case. In law every contracting party has a legal right, while it remains wholly executory, to breach a contract, being obligated to respond therefor in damages. In this instance the impossibility of performance occasioned the breach, and by no reasonable conclusion can we say that a breach of a contract operates as a performance of it.

But the defendant company contends it was lead to believe that plaintiff had performed under the written contract; that the plaintiff was aware of the limited authority of its agent, and that the company was lead to accept the money in ignorance of the real contract, and supposedly in ratification of a discount for cash under the written contract. This does not alter the situation; it does not and cannot change the fact. This corporation, like all corporations, could act only through some agent. It has acted, if at all, through an authorized agent, perhaps in a way unauthorized by the corporation; but the fact remains that the dealings of the parties made a new contract capable of ratification, under which delivery was made, and the delivery never was made under the written one; and the company must at its peril choose upon which contract it will rely. The parties make the contracts, not the courts. The courts cannot change title to property with resulting liability therefrom, merely because an agent has acted in excess of his express authority. The Code provision still remains of the same effect, that is, that so long as the contract remained executory, no title to the property passed until the buyer accepted it. N. D. Rev. Codes, 1905, §§ 4990, 4992. *Nichols & S. Co. v. Paulson*, 6 N. D. 400; 71 N. W. 136; *Colean Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614.

This case is covered on all points by *Colean Mfg. Co. v. Blanchett*. The order and all the principal facts are identical in that and this case. Of the two the instant case is the stronger, in that the proof as to a separate oral contract providing for trial of the machine prior to its acceptance and payment therefor is undisputed, while such facts were in dispute in the case cited. In that case the testimony was in conflict as to whether the machine fulfilled the warranty, but in this its worthlessness is beyond question. Appellant, to escape the force of the *Blanchett Case*, argues that in said case *Blanchett* had insisted on the written order containing a provision for trial in advance of acceptance of the machine, and that to such extent the order did not evidence the contract, and because thereof, the court went behind the written contract and based its decision on the oral negotiations leading up to the written order; while in the case on trial plaintiff is suing on an oral contract made after the written order, and that accordingly *Colean Mfg. Co. v. Blanchett* is not authority in the instant case. Such is defendant's analysis of the case quoted,—but a careful examination

of the opinion shows the contrary. We quote therefrom as follows: "We do not deem this a very material question as we are satisfied that an oral contract was made after the written order was signed, but before the sale became completed by a delivery of the machine thereunder." "The machine was not accepted by defendant under the written order; it was accepted under a new and independent contract." "In this case, however, the written order was not complied with at all, but repudiated, for the reason that defendant claimed that he had a right under the original negotiations to test the working of the machine. Upon defendant's repudiation of the order, a new contract was entered into, and the defendant was given the right to do what he claimed should have been included in the written order." Then again, from the above case on the question of the authority of the agent to make such new and independent contract in the face of a provision in the written contract remaining unexecuted, as in the case on trial, we quote the following: "The question as to the authority of the agents to modify the written order does not therefore become relevant or material in this case. So far as delivery of the machine is concerned, it never became binding on defendant under the written order, as delivery was made under another contract." In the case cited the court refers to the former decision of *Nichols & S. Co. v. Paulson*, 6 N. D. 400, 71 N. W. 136, a case in which a conditional delivery was made by the local agents not in performance of the contract, but on their own responsibility, in which a similar claim of want of authority on the part of the agent to so act was made, as follows: "Such delivery was, of course, conditional and passed no title. Plaintiff insists that the local agents were, to the knowledge of Spearing, unauthorized to make such conditional delivery. This may be granted; it may be true that plaintiff might have retaken the outfit immediately upon such delivery. But that fact could not convert the conditional delivery which was made into an unconditional delivery that was not made. It could not cast upon the buyer title to property that he refused to accept." For another parallel holding from the supreme court of Minnesota, see *Hicks v. Aultman Engine & Thresher Co.* 108 Minn. 327, 122 N. W. 15, for the same cause of action, under the same claims by the respective parties, in all respects as is the case on trial. Relative to the provision in the written contract against its alteration or the substi-

tution of a new contract by any agent of the company, we read from the opinion the following:

"The provision in the written contract to the effect that the agent had no authority to agree to an abandonment of the written order, and to make an oral one for the sale of the engine, was so broad and general in its terms as to amount to a limitation upon the power of the corporation itself, and was therefore void." See also *Reeves & Co. v. Younglove*, 148 Iowa, 699, 127 N. W. 1017; *Koester v. Northwestern Port Huron Co.* 24 S. D. 546, 124 N. W. 740; *Advance Thresher Co. v. Vinckel*, 84 Neb. 429, 121 N. W. 431; *First Nat. Bank v. Dutcher*, 128 Iowa, 413, 1 L.R.A.(N.S.) 142, 104 N. W. 497.

In *First Nat. Bank v. Dutcher* the Iowa court, in passing upon the authority of agents of the company to divest it from responsibility for all acts by contracts prepared for such purpose, has the following to say: "The appellant is a corporation which can act only through agents and employees; it cannot divest itself of the power to waive a condition made for its benefit, and that power can be exercised only through some agent. These men were its servants working in its interest, and must be presumed to have had the authority usually exercised by other agents under similar circumstances. To say that its agents were vested with the mere naked power to sell and deliver, without any authority to waive or modify any term of the printed contract, would be, as is well said in the *Pitsinowsky Case*, 37 Iowa 9: 'To establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith.' " We cite, without applying, the rule of the Minnesota and Iowa court above advanced, as the written contract is not herein the contract of the parties, and but incidentally in this respect within the case. When contracts are made, whether written or oral, the courts must deal with them as contracts. On the construction of such contracts, see *Advance Thresher Co. v. Vinckel*, 84 Neb. 429, 121 N. W. 431.

Counsel for the appellant urge that this case is covered by *Reeves & Co. v. Lewis*, 25 S. D. 44, 29 L.R.A.(N.S.) 82, 125 N. W. 289; and *Larson v. Minneapolis Threshing Mach. Co.* 92 Minn. 62, 99 N. W. 623; and *Vallancey v. Hunt*, 20 N. D. 570, 34 L.R.A.(N.S.) 473, 129 N. W. 455; and *Shull v. New Birdsall Co.* 15 S. D. 8, 86 N. W.

654; and *Colean Mfg. Co. v. Feckler*, 20 N. D. 188, 126 N. W. 1019. But to this we cannot agree. In the cases cited the decision in each instance is based upon the crucial fact that the sale was completed by a delivery under the order. In this case plaintiff's doom would have been sealed, at least so far as ingenuity and skill could by contract create liability on the one hand, and avoid responsibility on the other, had delivery been made under the written contract instead of under the oral one. If delivery had been made under the order, the terms of that written contract would have been put in force. But an executory contract remains such, and the fact that the parties may in writing contract in a manner whereby the limited powers of the agent are recognized for the purposes of the transaction evidenced by the contract, it is not for the courts to extend this feature any more than other provisions of the executory contract, to independent transactions, simply because the same subject-matter may be involved, or the written contract may account for the presence of the machinery at the place where in an emergency the agent assumes to deal, and is dealt with in the capacity of a general agent or with greater powers than he actually possesses. Such an oral contract, even when made by the company's unauthorized agent, under such conditions, if ratified, is binding according to its terms, not according to the terms of the written one superseded thereby.

Appellant urges that the notices given by registered letter to the defendant company were given under the written contract, and bind him to the order, and estop him from denying the delivery thereunder. The same was claimed in *Colean Mfg. Co. v. Blanchett*, and the following from the opinion in that case disposes of the appellant's contention in this: "It is true that the defendant gave notices to the company of the failure of the machine to work in the mode provided for in the order, and did some other things that would indicate that he was endeavoring to comply with the terms of the written order. We do not think that these facts show that there was no oral contract. The written contract contained a warranty, and defendant had in his hands a copy thereof, which specified what should be done by defendant in case of a breach of the warranty.

Under the oral contract, also, the machine was warranted to do good work. Although it was not incumbent on defendant to serve these notices under a delivery for trial purposes, still it is not a fact

that shows there was no oral contract. The defendant might well have thought it necessary to give these notices, although under the oral contract it was not necessary." This is likewise true under the evidence in this case.

Plaintiff is an experienced thrasher, and in his evidence shows that he relied upon the company fixing the separator or making the matter right. An additional reason was the absence of Cooper, which make it imperative that the plaintiff himself notify the company direct. His first letter imparted notice to the company that the separator was subject to return at once, and shortly thereafter by mail he demanded a refund of his money. We see nothing in this inconsistent with the actions of the ordinary individual under the same circumstances. In this connection the company parted with nothing, suffered no injury. They could not have been misled in any particular. It is plain that plaintiff has done no act upon which an estoppel can be predicated.

Another reason appears for the pleading of the notice. Plaintiff may have endeavored to bring himself within the rule of *J. I. Case Threshing Mach. Co. v. Balke*, 15 N. D. 206, 107 N. W. 57, and similar cases, as to notice and rescission, so as to enable him to be in a position to urge rescission by such notice of the written contract of sale, should the court have held the written order to have been the contract between the parties. Plaintiff cannot be criticized for this. Safe pleading demands that every cause of action and every right of recovery regarding the same be set forth; that the rights of the parties be fully determined upon the merits of the controversy in litigation. Holding as we do, and as did the trial court, that the oral contract is the one under which delivery of the property was made, we have eliminated thereby the question of rescission of the written contract, or sufficiency of notice to accomplish the same.

While the abstract shows many other specifications of error as to rulings on the admission of evidence during the trial and instructions to the jury, all are abandoned, appellant in his brief assigning only error in the particulars above discussed, and relying on assignments based on the assumption that the court must find a delivery of the machinery under the written order. Accordingly, this disposes of all assignments of error adversely to appellant. We consider the case covered in all particulars by the holding of this court in *Colean Mfg. Co. v. Blanchett*, as evidently did the learned trial judge who acted

as a member of this court by request in the decision of that case. It is likewise apparent that counsel for respondent framed the issues and tried this case to bring them under the case cited. We reaffirm the doctrine of that decision. Accordingly, the judgment of the trial court is affirmed, and judgment is ordered in accordance therewith.

MORGAN, Ch. J., not participating.

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STATE OF NORTH DAKOTA v. JOSEPH SCHUMACHER.

(132 N. W. 143.)

**Intoxicating Liquors — Nuisance — Evidence.**

1. Evidence examined, and held sufficient to sustain conviction for maintaining a common nuisance.

**Criminal Law — Witnesses — Attorney and Client — Confession to State's Attorney.**

2. Admissions of guilt made by the defendant to the assistant state's attorney, to procure discontinuance of prosecution, are admissible under the evidence in this case, and are not privileged as communications between attorney and client.

Opinion filed June 1, 1911.

Appeal from Ward County Court; *N. Davis*, Judge.

Joseph Schumacher was convicted of maintaining a liquor nuisance, and he appeals.

Affirmed.

*Palda, Aaker, & Green*, for appellant.

Defendant's admissions are inadmissible until the offense is proven by other evidence.

*Andrew Miller*, Attorney General, *Alfred Zuger* and *C. L. Young*, Assistant Attorneys General, and *Dudley L. Nash*, State's Attorney, for respondents.

Only a slight corroboration of a confession is necessary to convict.

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Note.—The admissibility in evidence of a confession made to the prosecuting attorney is considered in an elaborate note in 18 L.R.A.(N.S.) 768, on the subject, "When confession is voluntary," in which all the other authorities are reviewed.

People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Thrall, 50 Cal. 415; People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Badgley, 16 Wend. 59; State v. Patterson, 73 Mo. 695; Gantling v. State, 41 Fla. 587, 26 So. 737; People v. Hennessey, 15 Wend. 147; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672; State v. Winney, 21 N. D. 72, 128 N. W. 680; Com. v. Kelley, 152 Mass. 486, 25 N. E. 835; 2 Woollen & T. Intoxicating Liquors, 926.

Goss, J. Defendant, Joseph Schumacher, was convicted of maintaining a common nuisance by the keeping of a building in Kenaston, Ward county, in which intoxicating liquors were kept for sale and sold as a beverage. He appeals on two assignments of error. They are: 1st. That there is no evidence in the record to justify the verdict, because there is no evidence establishing the facts charged in the information outside of the alleged admissions of the defendant; and 2d, the court erred in the reception of certain testimony over defendant's objection. Without passing upon the question of whether the defendant could not be convicted of said crime upon admissions alone, without independent, corroborating testimony of acts tending to show the commission of the crime charged, it is apparent that the record is replete with evidence as to the *corpus delicti* and defendant's connection therewith, aside from such admissions; and that the evidence, with the admissions as corroborated, justified the verdict rendered. The uncontraverted evidence is that defendant ran a livery business and had in his employ one Hurd. This employee, at two different occasions mentioned in his testimony, sold beer at the barn in question, at which place intoxicated persons were seen. Defendant himself was quite a beer drinker. The state also established by the testimony of the railroad agent in charge of the depot and incoming freight shipments at Kenaston, that defendant had received in his own name, during the time charged in the information, several shipments of goods in casks and barrels bearing the label of the Heilman Brewing Company, billed to defendant as "beer, malt or malted liquors," for which defendant paid the C. O. D. charges, receipting in his own name and taking away the goods; and that the location of the livery barn in question was but a block from the depot where such deliveries were made.

These facts were supplemented by the following testimony of the



assistant state's attorney, to whom defendant admitted his guilt. "Mr. Schumacher told me that the farmers wanted to keep a little beer, and that he kept a little beer; that he gave away quite a good deal of it and sold some very cheap. I questioned him as to how much beer he usually got in a week, and he said he got about a barrel a week, and I asked him how much he received a bottle for the beer, and he told me he sold it for 25 cents part of the time, and part of the time he gave it away to farmers who came into his place of business; that he did not aim to make anything out of the beer he was handling, but was simply aiming to get enough to pay for the beer itself so he wouldn't lose anything. I said to him: 'Of course, you didn't expect to lose anything on the beer?' and he said, 'No, you know I couldn't give it away entirely. I had to have enough to reimburse me for the beer that I was handing out.' That was his language as nearly as I can repeat it. He made it plain to us that he was giving away quite a good deal of beer and sold just enough to reimburse him. The price when he sold it was 25 cents a bottle, and he really did not think he ought to be prosecuted under the circumstances, and he came to us to have us not persist in the prosecution. Schumacher told me when I asked him point blank what he got for the beer he sold. He told me he charged 25 cents a bottle; and I went on to have him explain to me how he figured to break even, and he went on and explained to me that that price he charged to some of the customers, and to others he gave away; aimed to just about break even on the cases of beer; that he did not aim to make any profit. I made him no promise of immunity."

The witness further testified that this conversation occurred during the week prior and after the opening of the term of court at which trial was had, and after information was filed in the case. None of the evidence was denied or explained, the defendant not taking the stand; and the case was submitted to the jury on this uncontroverted testimony. Undoubtedly the evidence is sufficient to sustain the verdict. A prima facie case was made out without the testimony of the assistant state's attorney, and with his testimony as to the admissions of the defendant, no other verdict could probably have been returned than a verdict of guilty.

Defendant's second assignment of error relates to the reception in evidence of the testimony of the assistant state's attorney, the ground

of objection being that the communication testified to was privileged as a communication between attorney and client.

Such objection is not well taken. The facts conclusively disprove such relationship. The defendant, so far as the record discloses, appeared at the office of the state's attorney and sought to have the prosecution against him abandoned, and apparently, in giving his reasons why the state should dismiss the action, confessed his guilt. That the state's attorney could not be induced to drop prosecution, because the defendant voluntarily appeared and confessed the crime as a supposed inducement to procure such dismissal, offers no ground upon which to assume any relationship of attorney and client upon which to base the objection urged. There is no merit in the objection urged.

The judgment of the lower court is accordingly affirmed.

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**ROBERT T. ROBERTS v. ENDERLIN INVESTMENT COMPANY, a Corporation, T. L. Beiseker, and All Other Persons Unknown, Claiming Any Estate or Interest in, or Lien or Encumbrance upon the Real Property Described in the Complaint.**

(132 N. W. 145.)

**Process — Service by Publication — Requisites — Jurisdiction.**

1. Filing the return of the sheriff, specified in subdivision 3 of § 6840 of the Code, thirteen days after the filing of the affidavit therein specified, and after the summons had been twice published, is not a sufficient compliance with the provisions of said subdivision to confer jurisdiction by publication of summons, when no other service of the summons was made, and no appearance was made by defendant in the action.

**Process — Service by Publication — Sheriff's Return — Affidavit.**

2. The provisions of § 6840 of the Code must be strictly complied with, to render effective an attempted service of summons by publication.

**Process — Service by Publication — Sheriff's Return — Time of Filing.**

3. In cases under subdivision 3 of § 6840 of the Code, the provisions thereof require that the return of the sheriff, therein specified, be filed in the action prior to the first publication of summons, in order to authorize service of the summons by publication.

**Process — Service by Publication — Sheriff's Return — Affidavit — Time of Filing.**

- 4. In a case arising under subdivision 3 of § 6840 of the Code, the filing of the return of the sheriff, therein specified, prior to the first publication of the summons, is a jurisdictional prerequisite, and a failure to so file such return is fatal to the validity of the service of the summons by publication.

Opinion filed June 6, 1911.

Appeal from District Court, Wells county; *Burke*, Judge.

Action by Robert T. Roberts against the Enderlin Investment Company and others. Judgment for defendant T. L. Beiseker, and plaintiff appeals.

Reversed and remanded, with instructions to render judgment for plaintiff.

*Youngblood & Wipple* (*Purcell & Divet*, of counsel), for appellant.

Verification of pleading by party must be in statutory form. 31 Cyc. 541, 542; *Wagoner v. Wagoner*, 76 Md. 311, 25 Atl. 338; *Columbus Show Case Co. v. Brinson*, 128 Ga. 487, 57 S. E. 871; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *Smith v. Stubbs*, 16 Colo. App. 130, 63 Pac. 955.

Strict compliance with statute is essential to publication of summons. *H. L. Spencer Co. v. Koell*, 91 Minn. 226, 97 N. W. 974; *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; *Priestman v. Priestman*, 103 Iowa, 320, 72 N. W. 535; *Stillman v. Rosenberg*, — Iowa, —, 78 N. W. 913; *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *Easton v. Childs*, 67 Minn. 242, 69 N. W. 903.

*E. H. Wright*, *R. A. Palmeter*, and *Edward P. Kelly*, for respondents.

Defendant alone can object to irregularity in the statutory prerequisites to an attachment. *Hawley v. Delmas*, 4 Cal. 195; *Wilke v. Cohn*, 54 Cal. 212; *Merced Bank v. Morton*, 58 Cal. 360; *Scrivener v. Dietz*, 68 Cal. 1, 8 Pac. 609; *Fridenberg v. Pierson*, 18 Cal. 152, 79 Am. Dec. 162; *Leppel v. Beck*, 2 Colo. App. 390, 31 Pac. 185; *Russell v. Work*, 35 N. J. L. 316; *Steinam v. Gahwiler*, — Tex. Civ. App. —, 30 S. W. 472; *Ex parte Perry Stove Co.* 43 S. C. 176, 20 S. E. 980.

Same, as to statutory prerequisites for substituted service.

NUCHOLS, Special Judge. This is an action to determine adverse claims to a certain tract of land described in the complaint, situate in the county of Wells and state of North Dakota. The complaint is in the regular statutory form. The respondent, T. L. Beiseker, is the only defendant who appeared in any manner in the action. The answer of the respondent, T. L. Beiseker, denies that the plaintiff has any interest in said land, except as the vendor in a certain contract in writing for the sale thereof to one William Wagner. Said answer further alleges, in substance, that said defendant succeeded to all the rights of said William Wagner under said contract, by purchase at a sale under execution of all his interest and equity in said land; that said defendant has tendered to plaintiff the balance of the purchase price of said land, according to the terms of said contract, and prays that plaintiff be required to execute and deliver to said defendant a deed to the said land, upon payment to plaintiff of said purchase price.

Plaintiff's reply admits the execution and delivery of said contract, but alleges a mutual rescission and cancelation thereof prior to the commencement of this action; and further alleges that the sale under execution of the interest of said William Wagner in said land was void, for reasons which will be considered hereafter.

The action was tried to the court without a jury, and judgment was entered directing plaintiff to execute and deliver to the respondent, T. L. Beiseker, a good and sufficient deed of warranty to the land, upon the deposit by said respondent, with the clerk of the district court, of the sum of \$2,766.93, the amount found to be due the plaintiff under said contract, and from which was to be deducted the costs of the action. From this judgment plaintiff appeals to this court, and demands a review of the entire case under § 7229 of the Code.

The record is rather voluminous, and we shall not state all the facts, but only such ultimate facts as we deem necessary to an understanding of this opinion.

On the 16th day of June, 1908, appellant, who was then the owner of the land in question, contracted in writing to sell the same to one William Wagner for the sum of \$2,800, to be paid by delivering to appellant each year a designated share of the crops grown thereon, until said sum was paid. Said Wagner delivered to appellant his share of the crops for the year of 1907, which was credited on the purchase price of said land, but in 1908, Wagner abandoned the land before the

crops of that year were harvested. Appellant thereupon took possession and has ever since been in possession of the land. On the 6th day of March, 1909, prior to the commencement of this action, said Wagner, by an instrument in writing, duly acknowledged, released, and relinquished all his right, title, and interest in the land to appellant. On the 11th day of August, 1908, before Wagner had released his interest in said land, respondent, Beiseker, attached same in an action in the district court of Wells county, against Willie Wagner, who is the same person as William Wagner, vendee in said contract, to recover an alleged indebtedness from said Wagner to said respondent.

On the 12th day of August, 1908, said respondent filed in said action an affidavit stating in substance that the residence and address of said Wagner were unknown, and that personal service of the summons could not be had on him in this state to the best knowledge, information, and belief of affiant. Summons in said action was published once each week for six successive weeks in a proper newspaper, the first publication being on the 14th day of August, 1908, and the last publication on the 18th day of September, 1908.

On the 25th day of August, 1908, the sheriff made and filed his return in said action, certifying that the summons therein was received by him on the 11th day of August, 1908, and that after diligent inquiry he was unable to make service thereof on said Wagner. No other attempt was made to serve the summons on Wagner; he did not appear in any manner in the action, and judgment by default was taken against him for a sum therein specified, and the judgment directed the sale of the attached property to satisfy the same.

On the 19th day of April, 1909, the sheriff of said county of Wells purported to sell to the respondent, Beiseker, all the equity and interest of said Wagner in the land in question, pursuant to a special execution issued on said judgment; and delivered to said respondent a certificate of sale therefor, and no redemption therefrom has ever been made. Before the action at bar was commenced, appellant was notified by respondent, Beiseker, that he had succeeded to the rights of said Wagner under said contract, and was ready, able, and willing to perform all the conditions thereof to be performed by said Wagner; but appellant refused to accept such performance by said respondent.

Appellant is the sole and unqualified owner of the land, unless the respondent, T. L. Beiseker, acquired the rights and interest of said

William Wagner in said contract, and is entitled to a deed upon the performance of the conditions thereof to be performed by the said Wagner. If said respondent has any interest in the land, the same was acquired by purchase at the sale under execution of the equity and interest therein of William Wagner, the vendee in said contract. But counsel for appellant contend that the judgment on which the execution was issued is void for several reasons, one of which reasons is that the return of the sheriff was not filed with the clerk of court at the time the affidavit for publication of the summons was filed, nor until after the summons had been twice published.

The cases in which, and the manner in which, service of the summons may be made by publications, are specified in § 6840 of the Code, which reads as follows: "Service of the summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and further stating: 1. That the defendant is not a resident of this state; or, 2. That the defendant is a foreign corporation, joint stock company, or association, and has no agent or person in this state upon whom service may be made under the provisions of § 6838; or, 3. That personal service cannot be made on such defendant within this state to the best knowledge, information, and belief of the person making such affidavit; and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons, he is unable to make personal service thereof upon such defendant."

The affidavit was filed on the 12th day of August; the first publication of the summons was on the 14th day of August, and the sheriff's return was made and filed on the 25th day of August, thirteen days after the affidavit was filed and eleven days after the first publication of the summons, and after the summons had been twice published; and the summons was only published four times after the sheriff's return was filed. Such publication was the only attempt to serve the summons on the defendant therein. We must hold that this was not

a sufficient compliance with the requirements of subdivision 3 of § 6840 of the Code, under which that case arose, to confer jurisdiction on the court to enter any judgment against the defendant, in the absence of any appearance by him in the action. The provisions of our Code are to be liberally construed, with a view to effect its object and to promote justice, yet, by the great weight of authority, including courts of states having statutes similar to ours for the liberal construction of the provisions of the Code, the rule is that statutes providing for the service of summons in any other manner than by personal service must be literally complied with and strictly followed, and we decide that the requirements of § 6840 of the Code must be strictly complied with to render effective an attempted service of summons by publication. 32 Cyc. 467; Cohn v. Kember, 47 Cal. 144; Stull v. Masionka, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166; Fink v. Wallach, 47 Misc. 247, 95 N. Y. Supp. 872; Gilmore v. Lampman, 86 Minn. 493, 91 Am. St. Rep. 376, 90 N. W. 1113; Granger v. Superior Ct. Judge, 44 Mich. 384, 6 N. W. 848; Harness v. Cravens, 126 Mo. 233, 28 S. W. 971; Hafern v. Davis, 10 Wis. 501; Paxton v. Daniell, 1 Wash. 19, 23 Pac. 441; Beckett v. Cuenin, 15 Colo. 281, 22 Am. St. Rep. 399, 25 Pac. 167; Mills v. Smiley, 9 Idaho, 325, 76 Pac. 786.

In *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, this court, construing a former statute providing for the publication of summons upon the order of court, said: "The statute was mandatory, and a failure to comply strictly therewith operated to confer no jurisdiction of the person of the defendant." In the case of *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491, the supreme court of Wisconsin, construing a statute providing for the service of summons by publication in cases therein specified, and providing that the order shall direct the service of the summons by publication thereof, and that on or before the date of the first publication, plaintiff shall mail copy of the summons and complaint as therein prescribed, held that the mailing of the copy before the making of the order was insufficient, and that subsequent publication of the summons conferred no jurisdiction of the person of the defendant.

Service of summons by publication is purely of statutory creation, and is effective only as the statute makes it so. Whatever the statute prescribes as a prerequisite condition cannot be dispensed with, and a failure to strictly comply with the provisions of the statute renders

the attempted service fatally defective. When a proceeding is commenced to obtain service of the summons by publication, the defendant has a right to examine the records in the case and to govern his conduct accordingly. It is therefore necessary that proof of the right, under the statute, to make service of the summons by publication, should appear in the files and records of the action before publication of the summons is commenced.

The filing of the required affidavit prior to the publication of the summons is a jurisdictional prerequisite by the provisions of § 6840 of the Code; and in cases arising under subdivision 3 of said section, the provision thereof that the affidavit therein specified, stating that personal service of the summons cannot be had on the defendant in this state to the best knowledge, information, and belief of affiant, shall be accompanied by the return of the sheriff certifying that after diligent inquiry or the purpose of serving the summons, he is unable to make personal service thereof, requires that such return of the sheriff be filed in the action prior to the first publication of the summons.

The statute requires, in such cases, that the inquiry by the sheriff for the purpose of serving the summons be made prior to the making and filing of the affidavit, and that both such return and affidavit be filed in the action prior to the first publication of the summons. The filing of the return of the sheriff, in cases in which the same is required, prior to the first publication of the summons, is as truly a jurisdictional prerequisite as is the filing of the required affidavit; and a failure to file such return is fatal to the validity of the service of the summons by publication. Publication of the summons prior to the filing of the return of the sheriff, in cases in which such return is required, is unauthorized by the statute, is equivalent to no publication, and confers no jurisdiction on the court to render a judgment against any defendant on whom there was no service of the summons, and who did not appear in the action.

We must therefore hold that in the action by the respondent, T. L. Beiseker, against Wagner, the court acquired no jurisdiction by publication of the summons therein, for the reason that the return of the sheriff, required therein, was not filed prior to the first publication of the summons, and consequently the judgment therein against Wagner was absolutely void. The judgment being void, it follows that all subsequent proceedings based thereon were void, and the attempted sale



under a void execution of the interest and equity of said Wagner, in the land in question, to the respondent, T. L. Beiseker, was absolutely void, and he acquired no interest whatever in the land by the purchase at such void sale. Other reasons are assigned by counsel for appellant why said judgment is void, but we need not consider them in this opinion.

By § 6940 of the Code, the lien of an attachment lapses and ceased to exist, unless the summons is served personally, or the publication thereof commenced within sixty days after the issuance of the warrant of attachment. The publication of the summons therein referred to means legal publication. As no summons in the attachment action was served on Wagner, and the summons in said action was never legally published, therefore the lien of the attachment ceased to exist before the action at bar was commenced, and the respondent, T. L. Beiseker, had no estate or interest in, or lien or encumbrance upon, the land in question when this action was tried in the district court, and judgment should have been entered therein in favor of plaintiff and appellant, quieting his title to the land against all claims of each and all of the defendants.

The judgment of the district court is therefore reversed, and the cause remanded for the entry of judgment in the district court in favor of the plaintiff and appellant, in accordance with this opinion, with costs to plaintiff and appellant in this court and the court below, to be taxed in the district court. It is so ordered.

All concur, except MORGAN, Ch. J., not participating, and BURKE, J., disqualified, having tried the case in the lower court; Hon. A. G. BURR, Judge of the Ninth Judicial District, and Hon. S. L. NICHOLS, Judge of the Twelfth Judicial District, sitting by request.

JOSEPH E. BAZAL v. THE ST. STANISLAUS CHURCH, a  
Corporation.

(132 N. W. 212.)

**Judgment — Default — Reopening — Grounds.**

1. The mere inconvenience to a party defendant, and the mere fact that he is busy with his farm work during harvest and neglects to attend to his defense in time to prevent the entry of a default judgment, do not furnish such excuse as is contemplated by the provisions of the statute admitting the opening of judgments entered through the mistake, inadvertance, surprise, or excusable neglect of the defendant.

**Judgment — Default — Vacating — Discretion.**

2. In this case the defendant was a religious corporation. Service of summons was made upon its secretary, who neglected, by reason of the pressure of his personal affairs, to provide for a defense. The chairman of the board of trustees called a special meeting about eight days after the service of the summons and complaint, for the consideration of the controversy. Such meeting was held. It is not shown that any preparation was made for interposing a defense. *Held*, that to vacate a default decree on such a showing constitutes, in a legal sense, an abuse of discretion.

Opinion filed June 6, 1911.

Appeal from District Court, Wells County; *Burke, J.*

Action by Robert T. Roberts against the Enderlin Investment Co. et als. Judgment for defendant, Beiseker, and plaintiff appeals. Reversed and remanded, with instructions to render judgment for the plaintiff.

*Feetham & Elton*, for appellant.

*H. C. DePuy and Jeff M. Myers*, for respondent.

This case comes up on appeal from an order granting defendant's application to vacate a default judgment taken against it on the 2d day of September, 1909, in the district court of Walsh county. The action was brought by the plaintiff to recover for services as organist of the defendant's church at Warsaw, in Walsh county. Service was made on Joseph Grzadzieski, as secretary of the defendant corporation, on the 31st day of July, 1909. The application was based upon the affidavit of such secretary, wherein he averred that he was the only person upon whom the summons and complaint were served; that serv-

ice was made on the evening of the 31st day of July, 1909, while he was in the act of unloading hay which he had brought a distance of 15 miles; and made upon his return to his farm after an absence of a week in putting up hay; that he realized that a considerable time would elapse before it would be necessary to bring the action to the attention of the defendant corporation so it might defend; and that he, being then rushed with his farm work, placed the summons and complaint in the pocket of his Sunday coat for further attention when such rush should be over; that he was a farmer, engaged in the operation of a farm of 160 acres; that such service was made on Saturday, and on the following Monday he was again compelled to return to his hayfield, and was there busily engaged for two days and a half; and that at the expiration of that time, on returning to his farm, he found his grain rapidly ripening and demanding immediate cutting; and that his crops ripened all at one time, and that he was compelled to throw himself into the work of cutting and saving the same; that when his cutting was complete, the one man he had for help left him, and from that time he was compelled to attend to his farm work and secure his crop without any help whatever; that thereupon threshing operations were begun, in which he was actively engaged until the 5th day of September, 1909, on which day he received a letter from the attorneys for the appellant announcing that they had secured judgment in said action. The secretary then asserts that it for the first time dawned upon him that the time allowed by the summons to engage counsel and defend had been rapidly slipping away; and that he thereupon immediately called the matter to the attention of the officers of the defendant corporation, who took steps to secure vacation of the judgment so entered. An affidavit of merits in due form and a proposed answer accompanied the application to vacate. We may further add that he states in his affidavit that when service was made upon him, he believed he would have an opportunity to bring the matter to the attention of the defendant corporation, but was so rushed with his haying, and so quickly and unexpectedly thrown into harvest and threshing, and perplexed and embarrassed by losing his help, that the time to answer expired before he realized that such time was nearing the end. Some affidavits were received in rebuttal of the affidavit of merits, and these resulted in a large number of affidavits, pro and con, as to the merits of the action and defense proposed. Among other affidavits submitted is one by the Rev. Stanislaus Majer, the parish priest, who is president of the board of

trustees, in which he testifies that at no time prior to September 3d, 1909, did he have knowledge that any officer of the defendant corporation had been served with process in such action, or that any action was pending against the defendant; that he came to this country in 1907, and understands English imperfectly, and can speak, read, and write the same to only a very slight extent; and that some time prior to the 3d of September, 1909, the plaintiff showed him some papers and in a general way made the statement that he had brought action to recover wages from the defendant church, but that the affiant was made to understand, and did understand, that the action referred to was a personal one against his predecessor, the Rev. B. Waldowski; and that at no time prior to September 3d, 1909, did he comprehend that any action had been brought or was pending against the defendant. In rebuttal, another affidavit of the Rev. Majer was received, in which he testifies that he was interviewed by defendant's attorneys with reference to the matter, and made statements to them of facts as to his connection with the action after the time of the issuance of the papers therein, and prior to entry of default of judgment; that such statements were made through an interpreter; and that the affidavit to which we have referred was incorrect in stating that he thought the action referred to was a personal one against the Rev. Waldowski, but that in fact he knew at the time the plaintiff talked to him, and at the time thereafter when he called a special meeting of the board of trustees, that the defendant had been sued, and that the action was against it; that his statement to the attorneys for the defendant was that he had supposed the Rev. Waldowski was handling the litigation for the defendant corporation, but that at no time did he state that he believed the litigation was against his predecessor personally; that on the 30th day of July prior to the service of the papers, plaintiff called upon him and showed him the summons and complaint and read and interpreted the same to him, and advised him that they were going to be served upon the defendant corporation; and that after the service of the papers upon the secretary of the defendant corporation, he, the said Majer, called a special meeting of the board of directors, at which the treasurer and another member were present, and informed them that said corporation had been sued, and advised them to make settlement, but that one of them insisted that it was necessary to carry it through to protect their honor; that at such time he, the affiant, was aware that said corporation had been sued and so advised both said members of said board. Other affidavits

were submitted tending to show that the secretary spent more or less time in town between the service of the summons and entry of the judgment; and that the business affairs of the church were transacted by the trustees on Sundays; and that on each of the Sundays intervening between service and judgment the secretary had been present, wearing his Sunday coat, at the church; and that meetings had been held at which business had been transacted; and further tending to show that a special meeting on the 8th of August, 1909, was called and held for the purpose of determining what action to take with reference to this suit. The statements of the priest that he was aware of the service of the papers and the pendency of the action against the church are uncontroverted, while those of other members of the board, although it does not appear that all members of the board testified that they had no knowledge of the pendency of the action, are controverted.

SPALDING, J. (After stating the facts). The motion to vacate this judgment was attempted to be brought within the terms of § 6884, Rev. Codes 1905, which provides for a court, in its discretion, relieving a party from a judgment obtained against him by his mistake, inadvertence, surprise, or excusable neglect, and the question for determination is whether the facts shown properly bring it within the terms of the statute referred to. It is elementary that the trial court, on such application, must exercise its discretion, but the discretion exercised must be a legal discretion, not an arbitrary one; it must rest upon facts in evidence before it, showing one or another of the grounds for vacating the solemn judgment of a court of record specified by the statute. The mere neglect of a defendant to employ an attorney and serve an answer, all the while knowing that suit has been brought and that an answer is required, without some sufficient and valid reason for the neglect, is no ground for vacating a judgment. Appellate courts will exercise great caution in reversing an order of a trial court vacating a default judgment, but if it clearly appears that the court was mistaken in vacating it, in a sense which amounts to an abuse of legal discretion, although it may be but a mere mistaken judgment of the extent of its discretion, it is the duty of the appellate court to reverse the order. On the affidavit of the secretary himself, it is nowhere disclosed that he forgot that the action was pending, or that he was ignorant of the fact that something would have to be done within thirty days from the date of service to protect the rights of the defendant corporation. None

of the usual excuses for failing to act are presented; nothing is disclosed as an apology for not acting, except that he was busy with his farming operations. If this is an adequate excuse, the statute permitting entry of default judgments at the expiration of thirty days after service made upon any defendant, during the different seasons when engaged in active farming operations, better be repealed, and courts be first required to ascertain whether it has been convenient for the defendant to give the action his attention.

There is no thrifty farmer in this state who is not busily engaged during such seasons; and not one of them could stop to secure an attorney to attend to litigation without interfering with the operations of his farm. This is not the kind of excuse which the statute contemplates as furnishing a ground for setting aside a default judgment. To recognize such an excuse would be in effect to hold that a judgment is no more binding and of no more stability than any unofficial writing or other document, and that it does not do what it is intended to do, in the absence of a valid excuse for vacating,—end a controversy. The mere inconvenience attending the engaging of an attorney to make a defense is not an adequate excuse for failure to defend. It is urged by the respondent that the decision of this court in *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102, is authority for sustaining the order appealed from in this case. We do not so consider it. We think in the opening of judgment in that case the court went as far as it is justified in going, yet the facts clearly distinguish it from the case at bar, and there are authorities sustaining the vacating of the judgment in that case. The neglect in that case was the neglect of the attorney, occasioned by his being engaged in a distant part of the state in the conduct of the defense in a trial for murder, and it was held that the defendant, having placed the whole matter in the hands of the attorney, had done all he could do, and his attorney's failure to answer, under the circumstances, and caused by his forgetfulness, constituted a surprise to the defendant, from which the court should relieve him. In the case at bar, no forgetfulness is alleged, even on the part of the party served, and he had employed no attorney. But we do not need to rest our decision upon the neglect of the secretary of the defendant corporation, because it is clearly made to appear that the president of the board of trustees was fully aware of the pendency of the action, and that a defense would have to be interposed. It, however, does not appear that it was made his duty, as such president,

to act further than authorized by the board to act. As to the knowledge of some of the other members of the board of trustees, the evidence is in conflict, while it is not shown that there were not still other members whose affidavits are not here, who knew about the suit.

Taking the evidence altogether, it is clear that no excuse is furnished justifying the vacation of the judgment. If we sustain the order vacating it, it will furnish a precedent for vacating any default judgment entered, when the only excuse is that the defendant knowingly permits judgment to be taken because it is more convenient to do so than to give it the necessary attention.

The respondent also contends that, the defendant being a corporation, its neglect occasioned by the failure of one of its officers to give the matter attention, or call it to the attention of the board, does not bring it within the general rule applicable to vacating judgments; and that this is particularly so in view of its being a religious corporation, where the negligent officers are presumably serving without compensation and only as a matter of public spirit or religious duty; and *Farrar v. Consolidated Apex Min. Co.* 12 S. D. 237, 80 N. W. 1079, and *G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.* 11 S. D. 376, 77 N. W. 1022, are cited as authorities. But there is a marked distinction between those cases and the case at bar. In those cases the service was made upon a director who appears not to have been on friendly relations with the officers of the corporation, and to have insisted that it had no defense; and it was there held that his failure to notify the corporate officials of the service upon him constituted surprise on the part of the corporation, which justified relieving it from the default judgments; but in the case at bar, as we have indicated, it is clear that the officials of the corporation had not only notice but knowledge of the pendency of the action and of the necessity of giving it attention. Hence, whether the secretary apprised them of the service of the papers or not is immaterial. The authorities mentioned are the only authorities cited by the respondent to sustain the order of the lower court, except *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955. The latter case comes much nearer being in point than either of the others, yet there is a clear distinction between it and the case at bar, and while we approve the holding of the court in that case, to the effect that the provisions of the statute referred to should be liberally construed to the end that cases may have a trial upon the merits, and justice be not denied, yet it seems to us that our

sister court was more liberal in the application of the rule of the statute than any authority which we have been able to find supports. The sympathies of a court in all matters of this kind are almost invariably enlisted in behalf of the party who seeks the relief, and this case is no exception, but still we feel that to sustain the vacation of this judgment would result in perverting the powers which are reposed in courts of record, and greatly increase and prolong litigation, rather than to terminate it. While we hesitate in such cases to overrule the judgment or discretion of the trial court, yet we feel compelled to do so in the case at bar, and hold that in a legal sense the discretion reposed in that court was abused. See *Davis v. Steuben School Twp.* 19 Ind. App. 694, 50 N. E. 1.

The order appealed from is reversed.

MORGAN, Ch. J., not participating.

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**ROCK ISLAND PLOW COMPANY, a Corporation, v. WESTERN  
IMPLEMENT COMPANY, a Corporation.**

(132 N. W. 351.)

**Sales — Conditional Sales — Filing as Chattel Mortgage.**

1. The plaintiff sold goods to L. & K. upon a contract reserving title until payment. The defendant secured possession of the goods before the said contract was filed with the register of deeds, but does not claim to be a subsequent creditor without notice, or a purchaser or encumbrancer in good faith for value. Under those facts the reservation of title is not void as to this defendant.

**Conditional Sale — Bankruptcy — Jurisdiction of Federal and State Courts — Conflict.**

2. After filing the said contract, plaintiff commenced an action in claim and delivery against the defendant, and the sheriff took the goods into his possession. The defendant rebonded and retained the goods. Three days later L. & K. filed a petition in bankruptcy, and their trustee took the said goods from this defendant in an action in the United States courts, but without making this plaintiff a party. *Held*, that the said property was in the lawful custody of the state courts, and that the defendant could not plead the action of the trustee as a defense in the action in the state court.

**Courts — Federal and State Courts — Conflicting Jurisdiction.**

3. The Federal courts will neither interfere with property in the lawful pos-



session of the state courts, nor tolerate interference by the state courts with property in its custody.

**Courts — Federal and State Courts — Conflicting Jurisdiction.**

4. Between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain its possession until final judgment.

Opinion filed April 3, 1911. Rehearing denied Sept. 12, 1911.

Appeal from District Court, Ward County; *Goss*, Judge.

Action by the Rock Island Plow Company against the Western Implement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*R. H. Bosard* and *G. W. Twiford*, for appellant.

Bankruptcy court dealing with property in its possession has power to pass on liens thereon. *McHenry v. La Société Française D'Epargnes*, 95 U. S. 58, 24 L. ed. 370; *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; *Ray v. Norseworthy*, 90 U. S. 128, 23 L. ed. 116; *Houston v. City Bank*, 6 How. 486, 12 L. ed. 526; *Clarke v. Rosenda*, 5 Rob. (La.) 39; *Conrad v. Prieur*, 5 Rob. (La.) 49; *Lewis v. Fisk*, 6 Rob. (La.) 162.

To justify sale by bankruptcy court, notice must be given of the application to sell. *The Lottawanna (Wilson v. Bell)* 20 Wall. 201, 226, 22 L. ed. 259, 264; *Nations v. Johnson*, 24 How. 195, 206, 16 L. ed. 628, 632; *Harris v. Hardeman*, 14 How. 339, 14 L. ed. 444; *Borden v. Fitch*, 15 Johns. 141, 8 Am. Dec. 225; *Buchanan v. Rucker*, 9 East, 192, 1 Campb. 65, 9 Revised Rep. 531; *Webster v. Reid*, 11 How. 460, 13 L. ed. 770; *Boswell v. Otis*, 9 How. 350, 13 L. ed. 170; *Oakley v. Aspinwall*, 4 N. Y. 513; *Weed v. Weed*, 25 Conn. 337; *Means v. Means*, 42 Ill. 50; *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70; *Wallis v. Thomas*, 7 Ves. Jr. 292; *Rockland Water Co. v. Pillsbury*, 60 Me. 427; *Lane v. Wheelless*, 46 Miss. 666; *Hettrick v. Wilson*, 12 Ohio St. 138, 80 Am. Dec. 337.

Referee is regarded as the court. *Re Simon*, 151 Fed. 507, 18 Am. Bankr. Rep. 205; *Re McIntire*, 142 Fed. 593, 16 Am. Bankr. Rep. 85; *Re Moody*, 131 Fed. 525; *Re Kellogg*, 57 C. C. A. 547, 121 Fed. 333, 10 Am. Bankr. Rep. 7; *Re Sanborn*, 96 Fed. 551, 3 Am. Bankr. Rep. 54; *Re Drayton*, 135 Fed. 883, 13 Am. Bankr. Rep. 602; *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Re Rochford*, 59 C. C. A. 388, 124 Fed. 182, 10 Am. Bankr.

21 N. D.—39.

Rep. 608; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

*Blaisdell, Bird, & Blaisdell*, for respondent.

*Res judicata* must be pleaded. *Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26; *Meiss v. Gill*, 44 Ohio St. 253, 6 N. E. 656; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728; *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *McLean v. Baldwin*, 136 Cal. 565, 69 Pac. 259; *Boston & C. Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 515; *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *First Nat. Bank v. Williams*, 126 Ind. 423, 26 N. E. 75; *Reilly v. Bader*, 50 Minn. 199, 52 N. W. 522; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *Eikenberry v. Edwards*, 67 Iowa, 14, 24 N. W. 570; *Independent Dist. v. Merchants' Nat. Bank*, 68 Iowa, 343, 27 N. W. 255; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Parlman v. Young*, 2 Dak. 175, 4 N. W. 139, 711; *Fahey v. Esterley Mach. Co.* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

Federal courts will not interfere with property in the custody of a state court, nor tolerate interference by a state court with property in Federal courts. *Re Russell*, 41 C. C. A. 323, 101 Fed. 248; *Linstroth Wagon Co. v. Ballew*, 8 L.R.A.(N.S.) 1204, 79 C. C. A. 470, 149 Fed. 960, and cases cited; *Re E. W. Newton & Co.* 83 C. C. A. 23, 153 Fed. 841; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; *Re L. Rudnick & Co.* 88 C. C. A. 85, 160 Fed. 903.

*R. H. Bosard and G. W. Twiford*, in reply.

Objection that *res judicata* is not pleaded cannot be first raised on appeal. *Kilpatrick v. Kansas City & B. R. Co.* 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26; *Meiss v. Gill*, 44 Ohio St. 253, 6 N. E. 656; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728; *Brown v. Campbell*, 110 Cal. 644, 43 Pac. 12; *McLean v. Baldwin*, 136 Cal. 565, 69 Pac. 259; *Boston & C. Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 515.

Stipulation of facts waives the necessity of pleading them. *Evans v. Woodsworth*, 213 Ill. 404, 72 N. E. 1082; *First Nat. Bank v. Williams*, 126 Ind. 423, 26 N. E. 75; *Reilly v. Bader*, 50 Minn. 199, 52

N. W. 522; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *Eickenberry v. Edwards*, 67 Iowa, 14, 24 N. W. 570; *Independent Dist. v. Merchants' Nat. Bank*, 68 Iowa, 343, 27 N. W. 255; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Parlman v. Young*, 2 Dak. 175, 4 N. W. 139, 711; *Fahey v. Esterley Mach. Co.* 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047.

BURKE, J. The facts that brought about this litigation were stipulated in the court below. Briefly stated they are as follows: The Rock Island Plow Company is a foreign corporation engaged in the manufacture and sale of plows and other farm implements. Prior to the commencement of this action, they had sold to Lorge & Knorr, local dealers of Minot, North Dakota, machinery to the value of \$1,000, upon a contract that reserved the title to said property in the vendors until payment had been made in full upon the purchase price. This contract was not filed with the register of deeds until October 27, 1905. On October 23, 1905, the Western Implement Company secured possession of said goods, and all of the same, from said Lorge & Knorr, and were in possession on October 28, 1905, when this action was commenced. The Rock Island Plow Company, this plaintiff, brought this action in claim and delivery, regularly, and the sheriff of Ward county took possession of the goods and delivered them to the plaintiff. The defendant immediately rebonded, and the property was returned to it by the sheriff. On October 31, 1905, Lorge & Knorr filed a voluntary petition in bankruptcy. Their trustee claimed the goods from the defendant, and recovered their possession in a suit in the United States court. In said suit the plaintiff was not represented, and its claim to said goods was never brought to the attention of the United States court. Later this plaintiff demanded his property of the trustee and of the referee in bankruptcy, but his demand was refused. It was further stipulated that plaintiff is entitled to judgment against the defendant in the sum of \$1,075, unless the foregoing facts in themselves furnish a sufficient defense.

The trial court adopted the stipulated facts, and filed his conclusions of law to the effect that the defendant was liable, and judgment was entered accordingly. The case was then appealed to this court. It must not be forgotten that the plaintiff, in its complaint, has alleged

that it was entitled to the immediate possession of the goods in suit upon October 28, 1905; that the said property was unlawfully detained from them by the defendant, and was valued at \$1,000. If it supports those allegations, it is entitled to the relief demanded, to wit, the return of the property, or its value if delivery is impossible, and for damages caused by its detention.

The first question arises upon the ownership of the goods. It will be remembered that the contract reserving title in plaintiff was not filed until October 27, 1907. Defendant insists that the said reservation of title is void under § 6181 of the Revised Codes of 1905, which provides that such reservations shall be void as to subsequent creditors without notice, and purchasers and encumbrancers in good faith and for value, unless the contract containing the reservation is in writing, and filed and indexed the same as a mortgage. However, the stipulated facts do not show the defendant to be entitled to make this claim. It was not a subsequent purchaser without notice, nor a purchaser or encumbrancer in good faith for value. The stipulation merely recites that the defendant upon October 23, 1905, obtained possession of the goods from Lorge & Knorr. As against them the contract of reservation was good. See *Thompson v. Armstrong*, 11 N. D. 198, 91 N. W. 39. Plaintiff had proven his title and was entitled to recover. The defendant further claims that when the plaintiff demanded the property from the referee in bankruptcy, he submitted the question of ownership to said referee, and is now bound by his decision. This claim is so clearly wrong that it hardly deserves consideration. In the first place the refusal of the referee to return the goods comes a long way from being an adjudication of the Federal courts, besides it is well settled that the Federal courts will not interfere with the state courts in their lawful possession of property in replevin actions. See *Re L. Rudnick & Co.* 88 C. C. A. 85, 160 Fed. 903, and cases cited.

In the case just cited the United States circuit court of appeals uses this language: "We are therefore confronted squarely with the question, Where the sheriff in an action pending in a state court holds property in replevin, taken by him prior to bankruptcy proceedings under claim of ownership, has the [United States] district court jurisdiction by summary order to compel the sheriff to deliver the property to a receiver appointed by said district court? . . . The jurisdiction of the district court is purely statutory, and unless the bankruptcy act

permits the taking of property from a state official holding it under process duly issued, the right to do so cannot be maintained. . . . Assuming that Congress might lawfully pass a law requiring the property of third parties found in the possession of the bankrupt, to be turned over to his trustee as part of his estate, it is sufficient for the purposes of this review that Congress has not done so in the present act."

In the case of *Re Russell*, 41 C. C. A. 323, 101 Fed. 248, the circuit court of appeals says: "When property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control, . . . and as between two courts exercising concurrent jurisdiction, the court which acquires possession will maintain its possession intact. . . . A Federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody."

The stipulated facts show that the state courts had acquired jurisdiction of the property three days before the filing of the petition in bankruptcy. The foregoing authorities establish the right of the said state courts to retain possession thereof until final determination of the dispute regarding the title. The defendant might have left the possession of the property with the plaintiff, and accepted their bond for its return if so decreed. They would not do this, but insisted upon the possession themselves, pending the suit. They gave a bond for its return to the plaintiff if so ordered. It is not the fault of the plaintiff that the goods were taken by an unauthorized person. The defendant must now return the goods or make good his bond.

The plaintiff has sustained all the allegations of his complaint and is entitled to recover. The judgment of the trial court was right, and is accordingly affirmed.

All concur, except MORGAN, Ch. J., not participating, and Goss, J., disqualified. WINCHESTER, District Judge, sitting by request.

## FRANK E. LUICK v. JOHN A. ARENDS.

(132 N. W. 353.)

**Divorce — Conclusiveness of Judgment — Res Judicata — Alienation of Affections.**

1. In an action for alienation of the affections of the wife, and for damages resulting, a decree of divorce obtained by the wife from the plaintiff after litigation on the merits, granted because of the husband's adjudged cruel and inhuman treatment of the wife during the period of time in issue under the pleadings in the alienation of affections case, the divorce action and proceedings, including the decree of divorce are not *res judicata* on the questions involved in the alienation of affections case against the third party, and plaintiff is not barred or estopped thereby from recovery against the third party for alienating the affections of the wife.

**Divorce — Conclusiveness of Judgment — Evidence — Res Judicata.**

2. In such an action the decree of divorce is a judgment *in rem* to the extent only of judicially establishing the prior existence of the marriage, its dissolution, and the status of the parties thereafter under the decree; such judgment is in all other respects a judgment *in personam*. The legal grounds upon which the decree was granted, and the pleadings in the divorce action, are not to be construed as a part of the judgment *in rem*. Therefore, the grounds upon which such decree is granted, as well as the pleadings in the divorce action, are not admissible as part of a judgment *in rem*: in the trial of an issue for alienation of the wife's affections, brought by the husband against a stranger to the divorce proceedings. The divorce decree alone, being a judgment *in rem* to the extent only as above defined, is admissible to establish the prior marriage, prove its dissolution, and fix the status of the parties in relation to the admission of testimony and issues to be determined in the alienation of affections case on trial.

**Husband and Wife — Alienation of Affections — Evidence — Wife's Declarations.**

3. In this class of actions, the existence or nonexistence of the wife's affection being in issue, her declarations to third persons not in the presence of her husband, as to her love of or hatred for him, when made at a time when there exists no motive to deceive, and before the commencement of the alienating influences complained of, are admissible; but any statements of facts or reasons to justify or explain her declarations of love or hatred are inadmissible.

**Divorce — Alienation of Affections — Evidence — Foreign Statutes.**

4. The statute of a foreign state declaring a forfeiture of a cause of action for alienation of a wife's affection when the husband has been by such wife, because of his fault, divorced, is given no extraterritorial force, and such stat-

ute does not operate to forfeit a right of action existing and sued upon here prior to the granting of the divorce in the state where such statute exists.

**Husband and Wife — Privileged Communications — Evidence.**

5. Privileged communications between husband and wife, under § 7253, Rev. Codes 1905, defined and applied in this case, where the former wife was offered as a witness in defendant's behalf against her former husband, to prove statements made by the husband and wife and events occurring during the period of her marriage relation.

**Husband and Wife — Alienation of Affections — Advice of Near Relations — Brother-in-law.**

6. A parent, brother, or sister has the right to counsel a married son, daughter, brother, or sister in good faith, within reasonable limits, when not maliciously done and when given for the apparent best interests of the party advised, without the relative so advising being liable to an action for injury caused one party to the marriage resulting from the advice so given; yet this privilege by reason of relationship amounts to but the presumption that the party so advising, because of natural love and affection of near blood relatives for one another, would act only for the best interests and with proper motives toward the person advised. Whether the privilege thus accorded near blood relatives in such matters extends to a brother-in-law of the wife advised in this case is a question of fact for the jury to determine under all the circumstances, under proper instructions from the court.

**Husband and Wife — Alienation of Affection — Interference of Stranger — Question for Jury.**

7. A stranger in blood inducing a wife to leave her husband, or taking her away with or without her consent, and encouraging her to remain away from him, does so at his peril, and the burden is on him to show good cause, good faith, and justification for such acts; but the question as to whether such person was justified in so doing is a question for the jury.

**Witnesses — Cross-examination under Statute — Redirect Not Permitted — Discretion of Court.**

8. The permitting of redirect examination immediately following cross-examination of the defendant under the statute, in plaintiff's main case, is discretionary with the trial court, but the better practice is not to allow such redirect examination until defendant's main case.

**Husband and Wife — Alienation of Affections — Evidence — Verdict.**

9. Evidence examined and held insufficient to sustain the verdict.

Opinion filed June 8, 1911. Rehearing denied Sept. 12, 1911.

Appeal from District Court, Richland county; *Allen*, Judge.

Action by Frank E. Luick against John A. Arenda. From a judgment for plaintiff, defendant appeals.

Reversed and remanded.

*McCumber & Forbes and A. D. Pugh*, for appellant.

The evidence is insufficient to justify the verdict. *Maloney v. Phillips*, 118 Iowa, 9, 91 N. W. 757; *Bathke v. Krassin*, 78 Minn. 272, 80 N. W. 950; *Sheriff v. Sheriff*, 8 Okla. 124, 56 Pac. 960; *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187; *Young v. Young*, 8 Wash. 81, 35 Pac. 592; *Hollister v. Valentine*, 69 App. Div. 582, 75 N. Y. Supp. 115; *Rubenstein v. Rubenstein*, 60 App. Div. 238, 69 N. Y. Supp. 1067; *Lund v. Spencer*, 42 App. Div. 543, 59 N. Y. Supp. 762; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Hoyt v. Graham*, — Iowa —, 105 N. W. 456; *Park v. Park*, 40 Colo. 354, 91 Pac. 830; *Peat v. Chicago, M. & St. P. R. Co.* 128 Wis. 86, 107 N. W. 355; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Miller v. Miller*, 122 Mo. App. 693, 99 S. W. 757; *Smith v. Gillapp*, 123 Ill. App. 121; *White v. White*, 76 Kan. 82, 90 Pac. 1087; *Rankin v. Cardillo*, 38 Colo. 216, 83 Pac. 170.

Defendant's acts must alienate or cause the separation. 21 Cyc. 1619, note 99; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Avery v. Avery*, 110 Iowa, 741, 81 N. W. 778; *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 270; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Miller v. Miller*, 122 Mo. App. 693, 99 S. W. 757; *Hardwick v. Hardwick*, 130 Iowa, 230, 106 N. W. 639; *Smith v. Gillapp*, 123 Ill. App. 121; *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A. (N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260; *White v. White*, 76 Kan. 82, 90 Pac. 1087.

Husband's consent to the wife's acts a complete bar. 15 Am. & Eng. Enc. Law, 2d ed. 863; 21 Cyc. 1619; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Peek v. Traylor*, 17 Ky. L. Rep. 1312, 34 S. W. 705; *Schorn v. Berry*, 63 Hun, 110, 17 N. Y. Supp. 572; *Kohlhoss v. Mobley*, 102 Md. 199, 62 Atl. 236, 5 A. & E. Ann. Cas. 865.

There was no ill-will or improper motive towards plaintiff, or wanton or reckless conduct implying malice, warranting exemplary damages. Rev. Codes 1905, § 6562; *Wrege v. Jones*, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 A. & E. Ann. Cas. 482; *Lindblom*.



v. Sonstelie, 10 N. D. 140, 86 N. W. 357; Beisel v. Gerlack, 221 Pa. 232, 18 L.R.A.(N.S.) 516, 70 Atl. 721; White v. White, 76 Kan. 82, 90 Pac. 1087; Avery v. Avery, 110 Iowa, 741, 81 N. W. 778; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 A. & E. Ann. Cas. 1173.

Verdict based on testimony of a discredited or infamous witness will be set aside. State v. Howser, 12 N. D. 495, 98 N. W. 352; State v. Prendible, 165 Mo. 329, 65 S. W. 559; State v. Huff, 161 Mo. 459, 61 S. W. 908, 1104; People v. Baker, 39 Cal. 686; Gibbons v. People, 23 Ill. 518; People v. Lyons, 51 Mich. 215, 16 N. W. 380; Owens v. State, 35 Tex. 361; Peat v. Chicago, M. & St. P. R. Co. 128 Wis. 86, 107 N. W. 355; Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359.

Judgment in divorce is *in rem*. 1 Greenl. Ev. 5th ed. § 525; 1 Freeman, Judgm. 4th ed. § 313.

When divorce decree as bar to suit for alienation of affections. Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Waldron v. Waldron, 45 Fed. 322; Metcalf v. Tiffany, 106 Mich. 504, 64 N. W. 479; Buckel v. Suss, 2 Misc. 571, 21 N. Y. Supp. 907, affirming 28 Abb. N. C. 21, 18 N. Y. Supp. 719.

Identity of issue, although not of parties, warrants plea of *res judicata*. 2 Jones, Ev. §§ 602-619; Doremus v. Root, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572; Wilson v. Buell, 117 Ind. 315, 20 N. E. 231; Whatley v. Manheim, 2 Esp. 608 (English); O'Brien v. Heeney, 2 Edw. Ch. 246; Sturtevant v. Randall, 53 Me. 149; Mayer v. Foulkrod, 4 Wash. C. C. 503, Fed. Cas. No. 9,342; Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Glaze v. Citizens' Nat. Bank, 116 Ind. 492, 18 N. E. 450; 1 Van Fleet, Former Adjudication, 461; Patton v. Loughridge, 49 Iowa, 218; 2 Van Fleet, Former Adjudication, 912; Van Rensselaer v. Akin, 22 Wend. 549.

Presumption of good faith exists as to relatives of wife whose husband sues for alienation. Powell v. Benthall, 136 N. C. 145, 48 S. E. 598; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 A. & E. Ann. Cas. 812; Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989; Smith v. Lyke, 13 Hun, 204; 21 Cyc. 1620; Multer v. Knibbs, 193

Mass. 556, 9 L.R.A.(N.S.) 322, 79 N. E. 762, 9 A. & E. Ann. Cas. 958; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Miller v. Miller*, 122 Mo. App. 693, 99 S. W. 757; *Smith v. Gillapp*, 123 Ill. App. 121.

Same of brother-in-law. *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598.

Record in divorce case admissible in suit for alienation. *Gleason v. Knapp*, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865; *Luick v. Luick*, 132 Iowa, 302, 109 N. W. 783; 2 *Van Fleet*, Former Adjudication, 772, 915, § 376; 23 Cyc. 1534-1537.

Wife's declarations inadmissible, except to show effects of defendant's influence upon her. *Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715; *Westlake v. Westlake*, 34 Ohio St. 634, 32 Am. Rep. 397; *Smith v. Gillapp*, 123 Ill. App. 121; *Dodge v. Rush*, 28 App. D. C. 149; 8 A. & E. Ann. Cas. 671; *Wignmore*, Ev. §§ 1730, 1768, and § 1730 of Supplement; 3 *Elliott*, Ev. § 1648; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Boues v. Steffens*, 43 N. Y. S. R. 29, 16 N. Y. Supp. 819; *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 93, 55 Pac. 46; 1 Am. & Eng. Enc. Law, 2d ed. 180; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

Wife's complaints of husband's ill treatment are admissible. 21 Cyc. 1624; *Perry v. Lovejoy*, 49 Mich. 529, 14 N. W. 485; *Baker v. Baker*, 16 Abb. N. C. 293; *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. Dec. 469; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085; 21 Cyc. 1625; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Bennett v. Smith*, 21 Barb. 439; *Payne v. Williams*, 4 Baxt. 583; *Smith v. Lyke*, 13 Hun, 204; *Holtz v. Dick*, 42 Ohio St. 23, 15 Am. Rep. 791; *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417.

*Purcell & Divet*, for respondent.

Grant of a new trial is in the sound discretion of the court, to be set aside only for abuse. *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397; *Pengilly v. J. I. Case Mfg. Co.* 11 N. D. 249, 91 N. W. 63; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *State v. Howser*, 12 N. D. 495, 98 N. W. 352; *Galvin v. Tibbs, H. & Co.* 17 N. D. 600, 119 N. W. 39; *State v. Foster*, 14 N. D. 561, 105 N. W. 938; *Libby*

v. Barry, 15 N. D. 286, 107 N. W. 972; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612.

Wife's statements showing her affection, or lack of affection, are admissible. 1 Greenl. Ev. 259; Phillipps, Ev. 147; Fratini v. Caslini, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 352; Higham v. Vanosdol, 101 Ind. 160; Horner v. Yancey, 93 Wis. 352, 67 N. W. 720; Horton, Ev. § 225; Collins v. Stephenson, 8 Gray, 438; 3 Wigmore, Ev. § 1730; Williams v. Williams, 20 Colo. 51, 37 Pac. 616; Hardwick v. Hardwick, 130 Iowa, 230, 106 N. W. 639.

All communication between parties to marriage when that relation exists are inadmissible. Rev. Codes, § 7253, subdiv. 1; Leppla v. Minnesota Tribune Co. 35 Minn. 310, 29 N. W. 127; Buckingham v. Roar, 45 Neb. 244, 63 N. W. 398; Henderson v. Chaires, 25 Fla. 26, 6 So. 164; Anderson v. Anderson, 9 Kan. 112; Chicago, K. & N. R. Co. v. Ellis, 52 Kan. 41, 33 Pac. 478; Van Zandt v. Shuyler, 2 Kan. App. 118, 43 Pac. 295; Sanborn v. Gale, 162 Mass. 412, 26 L.R.A. 864, 38 N. E. 710; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; Newstrom v. St. Paul & D. R. Co. 61 Minn. 78, 63 N. W. 253; Ayers v. Ayers, 28 Mo. App. 97; Warner v. Press Pub. Co. 132 N. Y. 181, 30 N. E. 393; People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; Stein v. Bowman, 13 Pet. 220, 10 L. ed. 134; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187.

A judgment is admissible only where there is mutuality between parties to the action in which it was rendered, and in the one offered. Sickler v. Mannix, 68 Neb. 21, 93 N. W. 1018; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226; Nowak v. Knight, 44 Minn. 241, 46 N. W. 348; Freeman, Judgm. §§ 154-158; Densmore v. Tomer, 14 Neb. 392, 15 N. W. 734; Bell v. Wilson, 52 Ark. 171, 5 L.R.A. 370, 12 S. W. 328; Moore v. Albany, 98 N. Y. 396.

Inharmonious relations do not justify intrusion of a stranger to injury of either husband or wife. These are pertinent to measure of damages only. Higham v. Vanosdol, 101 Ind. 160; Fratini v. Caslini, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 352; Nevins v. Nevins, 68

Kan. 410, 75 Pac. 492; Rath v. Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; Wales v. Minor, 89 Ind. 118; Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Modisett v. McPike, 74 Mo. 636.

Goss, J. This action is for damages for defendant's alienation of the affections of plaintiff's wife. The complaint charges defendant with alienating the wife's affections, and that this resulted in the separation of plaintiff's family. Plaintiff recovered a judgment ordered on a verdict for \$3,300. More than two weeks were occupied in the trial of the case, and the record is very voluminous, containing nearly four hundred assignments of error. The following statement, with the facts appearing in the opinion, will sufficiently explain the law governing the case:

Plaintiff and wife were married in 1887; have three children living, whose ages range from seven to fifteen years. They lived in Iowa until 1900, when plaintiff came to Richland county, his wife and family joining him there in the spring of 1901; there they remained until their separation on February 27, 1904, when the wife, Mary Luick, after a division of the property between husband and wife then had, removed to Iowa, taking the children with her, plaintiff remaining. The wives of plaintiff and defendant were half-sisters. Defendant is, and always has been, a resident of Iowa. Mary Luick's mother resides in Iowa, and it was to her place that the wife went on her leaving the home of plaintiff.

Plaintiff and wife had little domestic trouble until they came to North Dakota, although there is some testimony of isolated instances of alleged mistreatment of the wife by the plaintiff during their residence in Iowa. On the trial the wife testifies to many exhibitions of temper by her husband toward her from shortly after her marriage, and charges him with frequently applying toward her vulgar and obscene epithets, and that this, with their frequent disagreements, caused her loss of affection for him prior to her removal to North Dakota. That thereafter she frequently wrote to her relatives in Iowa, among them her brother, mother, and defendant's wife, complaining to them of plaintiff's treatment of her, and stated her intention of leaving plaintiff. Defendant and plaintiff had always been friends and dealt in a business way with each other, in the course of which transactions defendant purchased lands in plaintiff's neighborhood in North Dakota. Defend-

ant had been at plaintiff's home here on several occasions. On the 22d of February, 1904, plaintiff's wife's brother, accompanied by the defendant, appeared at plaintiff's residence, and shortly afterward announced that they had come to settle up matters between plaintiff and his wife and assist the wife and children back to Iowa. As to what occurred from this point on the testimony is very conflicting, plaintiff testifying to facts which, if true, show an interference by the defendant in plaintiff's family affairs, ending with the separation of plaintiff and wife, and in the preparation, execution, and delivery of articles of agreement effecting the division of the property and custody of the children, the wife securing deeds to the lands, and removing with the children to Iowa, accompanied by her brother and the defendant. After the expiration of one year and three days, or practically as soon as the wife had acquired the one-year's residence required by the statutes of Iowa before commencing an action for divorce, she instituted such an action against the plaintiff, charging him with cruel and inhuman treatment endangering her life during a period covering practically their entire married life, and asking a divorce, alimony, and custody of the children. The plaintiff appeared in the divorce proceedings and charged his wife with desertion, based on her leaving his home in North Dakota, February 27, 1904, and litigated on the merits the matters so put in issue in the divorce case in Iowa. The trial court granted the wife the custody of the children, alimony, and a divorce from the plaintiff, on the grounds of his cruelty alleged, finding against the plaintiff on his cross bill charging her with desertion. Plaintiff appealed to the supreme court of Iowa, which appeal was pending at the time of the trial of this case against defendant, Arends, in district court, but has subsequently been decided, as reported in 132 Iowa, 302, 109 N. W. 783, in favor of the wife by an affirmance by the Iowa supreme court of the trial court's decision.

This case, Luick v. Arends, was commenced in January, 1905, prior to the commencement of said divorce proceedings, and before the year's residence had been acquired by plaintiff's wife in Iowa. The trial of this action was had, commencing in February, 1906. The defendant pleaded the foregoing divorce proceedings, excepting the affirmance by the supreme court of Iowa of the decree of the district court, as a bar to the action and as estopping plaintiff from recovery, claiming the divorce on the merits in Iowa was an adjudication of all facts found and issues determined in such action, against plaintiff's alleged cause

of action in this case, and an estoppel by judgment precluding plaintiff's recovery. On the trial defendant, in support of his answer, offered the Iowa decree of divorce, and the same was received in evidence; he also offered in evidence properly exemplified copies of the summons, complaint, and answer of the parties litigant in the Iowa divorce case; this after the court had received in evidence the Iowa statutes as a foundation for the offer of the said pleadings. On plaintiff's objection, such offer of proof was rejected and the proof excluded by the trial court. The decree of divorce received did not state the grounds upon which the same was granted, and defendant maintains that the pleadings upon which the decree was granted are admissible; that the same would, when construed with the decree, operate as a bar to this action, and are also admissible as independent evidence tending to refute the averments of plaintiff's complaint, and substantiate the defense that the wife left plaintiff because of her loss of affection occasioned by plaintiff's cruelty toward her.

At the outset then, we are confronted with the question whether the decree of divorce granted the wife from her husband, the plaintiff, upon the court's findings of cruel and inhuman treatment of her by the plaintiff, endangering her life, covering the identical period of time embraced within the pleadings and evidence in this action between plaintiff and a third person, is *res judicata* or an estoppel by judgment on those questions and plaintiff's treatment of his wife, under investigation in this case against Arends, who was a stranger to the divorce action. The result of the divorce action was a judgment against this plaintiff, finding him at fault in the disrupting of his family relations, and adjudging the dissolution of the marriage because thereof, and justifying her action in leaving him. If the findings and judgment in the divorce proceedings are binding upon the plaintiff in this case, they absolutely preclude his recovery, and further discussion of the case and errors alleged would be needless.

The authorities are practically unanimous in their holdings that the decree is admissible, and is *res judicata* as against the world, only to the extent of judicially establishing the prior existence of the marriage and its dissolution and the status of the parties thereafter under the decree. To this extent only is the divorce judgment a judgment *in rem* and *res judicata* in this action; the divorce decree establishes its own existence only, and thereafter the status of the former husband

and wife, as between themselves and the world; but the judgment of divorce does not carry into this case, under the rules of former adjudication or estoppel by judgment, the issues involved in the divorce trial, nor the grounds upon which the decree of divorce was granted. For reasons of public policy only does the law treat the divorce action as a proceeding *in rem*, and this only to the above extent. It is a well-known rule of law that in a proceeding strictly *in rem* not only the parties named in the action, but the world, is concluded by the judgment, not only to the extent of the judgment itself, but as to all matters in issue and necessarily determined in the findings of fact and decision of matters of law upon which the judgment is based; but a divorce decree is in all things a judgment *in personam*, and as such the rules of evidence applicable to judgments *in personam* apply, except so far as the same is to be treated as a judgment *in rem* as above stated. Hence, the Iowa divorce decree is not admissible in evidence except to establish its own existence, the marriage of the parties being admitted, and as bearing upon the admissibility of testimony relating to the statute as to privileged communications between husband and wife. It is not *res judicata* to plaintiff's cause of action; it does not estop by judgment plaintiff from asserting his cause of action against defendant, Arends. Arends was a stranger to the record in the Iowa divorce proceedings; the judgment in that case did not bind him, except as it operated as against the world in certain particulars only as a judgment *in rem*. The rule is general that a judgment or decree is not admissible in evidence as *res judicata* on the facts involved, or to operate as an estoppel by judgment in other than actions strictly *in rem*, except as between parties or privies. There must be a mutuality between the parties to the action in which the decree is rendered and in the action in which it is offered, and it is only admissible in favor of a party when it would be admissible against him if the decree had been the other way. Applying this test, it is plain that the trial court's ruling in excluding the grounds upon which the decree was entered is correct. Suppose the plaintiff in this action had prevailed in the divorce suit under his claim of desertion by the wife, and in this action plaintiff had offered in evidence the decree of divorce granted him and entered against his wife's claim of cruelty, as proof that he had not been guilty of the acts of cruelty charged in defendant's answer in this case, and had not by cruelty alienated her affections. It is clearly apparent that

such testimony would be inadmissible as against the defendant in this action; he was not a party to the divorce action, nor could he be, nor could he have privity with any party to that action for divorce. The rule is thus stated in Black on Judgments, vol. 2, § 548, in the following language: "It is essential that its operation be mutual. Therefore, a party will not be concluded against his contention by a former judgment, unless he could have used it as a protection or as the foundation of a claim had the judgment been the other way; and conversely, no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case." Greenleaf on Evidence, §§ 523, 524, is to the same effect: "It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be held bound. Under the term 'parties' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine the witnesses adduced on the other side; persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party, are bound by the proceedings to which he was a party, is that they are identified with him in interest, and wherever this identity is found to exist all are alike concluded. . . . But to prevent this rule from working injustice, it is held essential that its operation be mutual; both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. For, if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony, in which case to allow him to derive a benefit from it would be unjust. Another qualification of the rule is that a party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or



course of the proceedings, he could not avail himself of the same means of defense or redress which are open to him in the second suit."

Wigmore on Evidence, § 1348, subdivision 2A, recognizes the fact that apparently contrary judgments may be rendered by different courts on the same facts, as counsel contends has resulted in this action, between different parties, under this rule, by the following comment upon it: "A judicial judgment binds only the parties to the specific litigation, and therefore the same question of fact must be investigated anew, even innumerable times, between parties not affected by prior judgments. There may therefore be an analogous situation in which innumerable parties will be affected by a fact common to the rights or duties of all, and this fact, in the absence of a judicial proceeding binding on all, may be from time to time differently determined by different juries and judgments in successive litigations."

See authorities collected in 30 Century Dig. Cols. 1984, 1985, and 1883-1887. See also Freeman on Judgments, § 159: "The operation of estoppels must be mutual; both litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either."

The reports contain many cases for alienation of affections in which this doctrine of *res judicata* has been unsuccessfully attempted as a defense, under issue similar to those before us. As an instance, see Sickler v. Mannix, 68 Neb. 21, 93 N. W. 1018, in which case the husband of the defendant, Ellen Mannix, had obtained a decree of divorce from her on grounds of her extreme cruelty, and the same was offered in evidence by plaintiff in error, corresponding to the defendant in this case, on the same grounds as the defendant seeks the introduction of the same kind of a decree and same complaint as in this case on trial. The appellate court sustained the trial court in excluding such testimony, using the following language: "We do not think that error can be predicated on the refusal of the court to allow the record in evidence. Mrs. Sickler was not a party to that suit, and it is only where a judicial record contains an admission of one or the other of the parties to it that it is admissible as such in favor of a stranger." Citing Greenl. Ev. § 527A. This case is on all fours with the case before us. See also Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540, which case is identical with the matters under consideration in this case, alienation of wife's affections, when read in connection with the divorce case of Knickerbocker v. Knickerbocker, 135 Mich. 102, 97 21 N. D.—40.

N. W. 1117, in which last case judgment for divorce in favor of the wife for cruel and inhuman treatment is ordered against her husband, who had pleaded and attempted to prove in his action against her, her adultery; and afterwards in his case against Worthing, above cited, he sued and recovered for alienations of affections occasioned by the adultery of the wife with Worthing during the same period mentioned in the divorce proceedings, and this in spite of the fact that the wife had been granted a divorce the same as has the wife in this case on trial. The court, considering the same question now under discussion, used the following language: "Counsel also says that because the court passed upon that phase of the case, and found the charge of adultery was not made out in the divorce case, the decree in that case is conclusive upon that question, citing as to both of these claims, Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388, 22 N. W. 865. There is language in the opinion in that case which tends to justify the claim of counsel, but when the case is considered carefully it will be found to be distinguishable from this one. In the case brought by him [Gleason] against Knapp, the court found the facts sworn to by him were entirely contradictory to his sworn bill against his wife. The question involved in the case of Knickerbocker v. Knickerbocker was whether the wife was entitled to divorce upon the ground of cruelty. We held that she was. The question involved here is whether the affections of Mrs. Knickerbocker were alienated by the unlawful acts of the defendant. We think the case comes within Correy v. Lackey, 105 Mich. 363, 63 N. W. 418."

The above is quoted at length for the reason that it is the ruling of that court upon the matter before us, distinguishing a case cited by appellant as supporting his contentions in this case on this question. The case of Gleason v. Knapp is further distinguishable from the case on trial in as much as in that case the doctrine really applied was that of estoppel by pleadings, whereby Gleason was not permitted to take a position in his alienation of affections case diametrically opposed to his verified complaint in his divorce case. This plaintiff is now alleging practically the same facts as he alleged in defense of his wife's action for divorce. As the divorce judgment is not mutual under the above authorities, it does not bar him from alleging the same facts in his complaint in this action. There is no estoppel because of his pleadings, his claims in each case being consistent, consequently the case cited,

Gleason v. Knapp, does not apply. The case Correy v. Lackey, cited in the above quotation, holds that "The fact that defendant's wife procured a divorce from him on the ground of extreme cruelty will not conclude him from denying that he was guilty of cruelty, on an issue as to her justification in leaving him, raised in an action against him by a third person for necessities furnished the wife after she had left her husband, and before getting her divorce."

To the same effect also is Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100, where the wife obtained her divorce as in the case on trial, and the husband, Michael, sues the third party for alienation of affections and criminal conversation with his former wife. It was sought to make the divorce and grounds thereof *res judicata* in favor of Dunkle, the stranger to the divorce action. The court disposed of the question summarily in the following language: "The woman was still the appellee's wife, and, notwithstanding the differences which had led to the separation, which it seems was caused by his cruelty, there might have been a reconciliation between them, and, indeed, there is evidence that the appellee was seeking to bring this about at the time the offenses of the appellant were committed and discovered. After this discovery, it is not strange that the appellee permitted his wife without resistance to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement or even a separation between her and the husband, as a complete defense to an action by the latter for the wrong. Judgment affirmed." Cited and followed in Wales v. Miner, 89 Ind. 118. See also Modisett v. McPike, 74 Mo. 636, to the effect that, although a wife may have a just cause for a separation or divorce from her husband, and she may separate or obtain a divorce from him, assigning such cause as the ground thereof, yet, if she would not have sought the separation or sued for the divorce but for the intentional and unsolicited interference of a third person inducing her so to act, such separation or divorce or just cause therefor does not of itself constitute any defense to an action by the husband against such person for the loss of his wife's society, services, and affections. In this case the decree was received in evidence, but was held not a bar to recovery.

In Coney v. Harney, 53 N. J. L. 53, 20 Atl. 737, in a case similar to the one on trial, on the same question under consideration as the

present, the court used the following language: "It has been contended in support of the plea that the decree therein set up is conclusive against the plaintiff as *res judicata*, and affords defendant a bar to this action. It was argued with ingenuity and no little force that the law ought not to permit one who has made an issue of this character, and, having presumably produced all the evidence in his power, has encountered a defeat thereon, to again vex the courts by a retrial of the same issue. Such considerations have elsewhere induced legislation providing for making the alleged adulterer a party to the divorce proceedings as corespondent, but no such legislation has changed our law. We are therefore left to enforce the well-settled and undisputable rule on this matter, an estoppel, even by the judgment of a court, must be mutual, to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality; for had it been adjudicated that defendant had committed the adultery charged in the cross petition, such adjudication manifestly could not have been set up against him. Under the rule referred to, he cannot set up the adjudication in his favor." This is our case over again, except in the divorce proceedings out of which the action for damages arose, both the plaintiff and his wife charged the other with adultery, the wife recovering judgment for divorce on her husband's adultery, the husband's allegations as to the wife's adultery with the defendant having been dismissed; and thereafter the husband recovers judgment against his former wife's paramour for adultery with plaintiff's wife; the divorce proceedings exonerating the wife from adultery, and finding the husband guilty thereof; the alienation case thereafter in effect finding the paramour with the wife guilty of adultery with her, and awarding the wronged husband damages therefor.

Two Kentucky cases construed together furnish us nearly a counterpart to the case on trial. They are *Klein v. Klein*, 29 Ky. L. Rep. 1042, 96 S. W. 848, and *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 392. The first was an action brought by the wife against the husband to obtain alimony, to which the husband answered, and, by counterclaiming against the wife, sought a divorce from her on the ground of her abandonment of him. The trial court dismissed his counterclaim and awarded the wife a monthly alimony, and on the husband's appeal the judgment was reversed, and the supreme court ordered a divorce granted on the husband's application based on the wife's deser-

tion. The testimony involved difficulties of the wife with the husband's parents, so that their conduct toward the wife was in issue in the divorce proceedings. Thereafter the wife, though divorced by the husband as the party in fault, commenced her action for damages against the parents of her husband for alienating her husband's affection and separating him from her, and recovered judgment against them for \$5,000, and the verdict was upheld. The court in so doing determined the same was not excessive. The facts are practically parallel with the case at bar, in which the plaintiff herein, though adjudged the guilty party in the divorce, recovers judgment similarly against a third party, though the facts litigated and the issue in each case were practically identical. *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 383, is quoted as authority later in this opinion.

For additional authorities that a divorce is not a bar to an action for previous criminal conversation or alienation of affections, see *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99; *Haynes v. Nowlin*, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; *Clow v. Chapman*, 125 Mo. 101, 26 L.R.A. 412, 46 Am. St. Rep. 468, 28 S. W. 328; *Beach v. Brown*, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. Rep. 98, 55 Pac. 46; *Purdy v. Robinson*, 133 App. Div. 155, 117 N. Y. Supp. 295; *Keen v. Keen*, 49 Or. 362, 10 L.R.A.(N.S.) 504, 90 Pac. 147, 14 A. & E. Ann. Cas. 45; *Dickerman v. Graves*, 6 Cush. 308, 53 Am. Dec. 41; *Ratcliff v. Wales*, 1 Hill, 63; *Smith v. Smith*, 98 Tenn. 101, 60 Am. St. Rep. 838, 38 S. W. 439; *Burlen v. Shannon*, 3 Gray, 387; *Gill v. Reed*, 5 R. I. 343, 73 Am. Dec. 73. Nor does the fact that the husband may have separated from the wife bar an action for alienation of her affections. *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607; *Browning v. Jones*, 52 Ill. App. 597; *Schorn v. Berry*, 63 Hun, 110, 17 N. Y. Supp. 572; *Jenkins v. Chism*, 25 Ky. L. Rep. 736, 76 S. W. 405. The husband's right and chances of reconciliation, after separation of husband and wife, cannot wrongfully be interfered with, or prevented by a third person, without giving the husband a right of action for alienation of wife's affections. *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. 252; *Dallas v. Sellers*, 17 Ind. 479, 89 Am. Dec. 489; *Bishop, Marr. & Div. § 1362*. The previous terms upon which a husband and wife may have been living, no matter how inharmonious they may have been,

furnish no justification for a stranger intruding into the home and carrying away one or the other, or alienating the affections of husband or wife. *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *Rath v. Rath*, 2 Neb. (Unoff.) 600, 89 N. W. 612. Death of the wife whose affections were alienated does not bar or abate the action. *Yundt v. Hart-runft*, 41 Ill. 9.

The foregoing authorities, all in cases brought for alienation of affections or criminal conversation, might be multiplied by numerous citations in cases of a different nature, in which the same doctrine has been applied without variance.

See *Jacobs v. Miller*, 41 Mich. 90, 1 N. W. 1013; *Whitcomb v. Hardy*, 68 Minn. 265, 71 N. W. 263; *Goodnow v. Litchfield*, 63 Iowa. 275, 19 N. W. 226; *Nowak v. Knight*, 44 Minn. 241, 46 N. W. 348; *Densmore v. Tomer*, 14 Neb. 392, 15 N. W. 734; *Bell v. Wilson*, 52 Ark. 171, 5 L.R.A. 370, 12 S. W. 328; *Moore v. Albany*, 98 N. Y. 396, on p. 400.

The review of authorities would not be complete without reference to the case of *Hamilton v. McNeill*, 150 Iowa, 470, 129 N. W. 480. in which case that court, by a divided opinion, based upon § 3181 of the Iowa Code, holds under the Iowa statute that the guilty party under the divorce decree forfeits any cause of action he may have for alienation of his former wife's affections. The majority opinion discusses the question of how far the divorce decree, including the grounds upon which it is issued, is *res judicata* as against the defendant in the alienation case, and announces its conclusion contrary to the settled rule illustrated by the foregoing authorities, and contrary to our holding in this case. But it is noticeable that, in the eighth paragraph of the opinion, that court makes it plain that its decision "is based upon the statute and upon that alone as all sufficient;" that "the only question of public policy involved is that of the statute," and "the only question of estoppel involved is that which adheres in the case of divorce." Considering the very able dissenting opinion of Judge Deemer, it is easy to ascertain the reason why the majority expressly based its holding solely upon the statute. The dissent leaves little if anything upon which to hang the majority opinion, so far as the majority opinion is to be considered as other than a construction of the Iowa statute. The action of the majority of that court under the fire of the dissenting opinion, in practically abandoning all propositions advanced in

its opinions, except, solely the one of statutory construction, must be taken as authority to the contrary of their conclusions so advanced and so abandoned, and in line with the dissent, and as authority for our conclusions in this case.

We might in passing remark the action of the Iowa court in *Sexton v. Sexton*, 129 Iowa, 487, 2 L.R.A.(N.S.) 708, 105 N. W. 314, hereinafter discussed, in ignoring the Iowa statute as to privileged communications between husband and wife, on the express grounds that such statute and rule was never intended to be applied to cases of alienation of affection; and the contrary action in *Hamilton v. McNeill*, wherein the court goes to great lengths to overrule the former decision of *Wood v. Mathews*, 47 Iowa, 409, and construes a statutory forfeiture into the same kind of an action on a statute of doubtful application.

See also *McNamara v. McAllister*, 150 Iowa, 243, 34 L.R.A.(N.S.) 436, 130 N. W. 26, an Iowa case decided since *Hamilton v. McNeill*, above cited. In *McNamara v. McAllister*, a divorce decree procured because of the cruel and inhuman treatment of the husband toward the wife, the husband being adjudged the party at fault, was plead in mitigation of damages by a third party defendant in an action by the husband against him for alienation of the affections of the former wife. On a ruling on a motion to strike that portion of the answer pleading the divorce from the record, the court uses the following language: "The decree of divorce obtained by plaintiff's wife is not pleaded as a complete defense, but in mitigation, or at least it may be so considered. As this matter may doubtless be treated in mitigation of damages, and under the recent decision of *Hamilton v. McNeill*, 150 Iowa, 470, 129 N. W. 480, in bar of the action, the motion to strike was properly overruled." From the language used, it may still be considered in doubt as to whether the holding in *Hamilton v. McNeill* will be adhered to, should *McNamara v. McAllister* again reach that court on the facts.

The trial court's action in excluding the divorce record was proper.

The defendant's attempted defense under the doctrine of *res judicata*, in the light of all authorities on the question, cannot be successfully maintained. It would indeed be a strange condition of affairs if a stranger might invade the home, carry the wife into a foreign jurisdiction, and, by the exercise of the same influence that lead her away,

persuade her to procure a divorce, and then urge the fact of divorce as a bar to an action for the very wrong that brought it about.

The section of the Iowa Code, 3181, above referred to, was not offered in evidence in this case. But mention was made of this statute in defendant's argument. Defendant urges that this statute with the Iowa court's construction of it should be given force and be adopted as the law of this case. In other words, it is urged that, because the divorce was granted in Iowa, the Iowa statute, § 3181, providing: "When a divorce is granted the guilty party forfeits all rights acquired by the marriage," as construed in Iowa to be a forfeiture of any right of action by the guilty party of a cause of action for alienation of the wife's affections, should be given force here, and forfeit plaintiff's right of action in this case against Arends.

The cause of action we are asked to declare forfeited by this provision came into existence and fully accrued in this state, while the parties were residing here for several years. Their separation occurred here. For the statute to have force, there must be a divorce granted in Iowa and a guilty party under the Iowa statute; and the rights to be forfeited must be subject to the Iowa jurisdiction, also extraterritorial force must be given to the Iowa statutory penalty so imposed under the Iowa statute. Considering these questions in order, the divorce must be granted before the forfeiture applies, even in Iowa. The forfeiture then comes as a consequence or incident of the divorce. The cause of action for alienation of affections exists in Iowa until divorce. Such are barred by the divorce, being dependent on the decision of the cause of action for divorce. It is not then a question solely of rights acquired by the marriage, but a question of rights acquired by the marriage and forfeited by divorce by the party adjudged to be the guilty party in the decree. In other words, the forfeiture so declared is a statutory penalty for being the guilty party under the divorce proceedings, and is in the nature of a penalty for being guilty of acts constituting grounds for the divorce. In this connection we might observe that, had the wife, on separation from her husband at the procurement of defendant, as has been found by the jury in this action to be the fact, domiciled herself for divorce purposes in some state other than Iowa, we would not be construing this statute, but, by the same course of reasoning under which it is now urged before us for consideration, perhaps a different statute would be under consid-



eration under this plea for a foreign statute to override our own statute and ordinary course of procedure in this case. It is then singular, granting in argument defendant's contention, that an existing cause of action in favor of the plaintiff can turn on the caprice of the wife as to the selection by her of her domicile for the contemplated divorce. Had *Hamilton v. McNeill* been decided before the separation, and if the doctrine now presented by defendant for our consideration is to be approved, and extraterritorial force thereby given to the Iowa statute and decree, we have no doubt the wife, if acting under legal advice, would have domiciled herself in Iowa, that the divorce, if obtained by her at all, might accomplish the double purpose of protecting this defendant from the accrued right of action for damages in litigation in this case.

Again referring to the statute, we observe that there must be to the proceedings what is there designated a "guilty party," in order for the statute to operate as a forfeiture. It is significant that under our law no one is branded by a decree of divorce, or the law under which the same is granted, as a "guilty party." Such a term is unknown to our statute. In Iowa the penalty for being adjudged the guilty party is a forfeiture of all rights acquired by the marriage. We have no such designation or statutory penalty. This, while perhaps not controlling, is significant. Instead, we have § 4048, reading: "Marriage is dissolved only, (1) by the death of one of the parties, or (2) by judgment of a court of competent jurisdiction decreeing a divorce of the parties. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted." Our statute is plain. The parties are restored to the state of unmarried persons, excepting only the prohibition against remarriage within three months. They are not restored to the state of unmarried persons, except as the laws of Iowa or some other state operate to forfeit a cause of action for alienation of wife's affections. After divorce, the former parties to the marriage relation are in no respect under the law burdened with the former marriage; they carry, by virtue of the marriage so dissolved, none of its burdens over, upon, and into the next marriage either may contract. They, being unmarried persons, enjoying all rights under the law as such, may maintain actions at law on any cause of action recognized by our law as such,

including actions for alienation of affections. While the proof in such an action may embody circumstances that arise out of the marriage of the parties in Iowa, likewise their divorce in Iowa, likewise the existence of the parties, their age, status in life, and other evidentiary facts presumed, admitted, or provable in the action for alienation of affections, altogether making a cause of action recognized by law existing complete as a property right, we can see nothing therein to thereby necessarily distinguish such a cause of action from any other available to litigants in our courts. Why, then, should a foreign statute be by court decision imported into the law of this case, in direct contravention of our own statute above quoted? The policy of our state is as declared by our legislative acts, and, where so declared, they are controlling, and exclude even the common law, except as they are declaratory or continuations thereof.

But it is urged that the Iowa statute with the court's construction of it should be adopted as the law of this case, under some rule of comity between states that the same should be given extraterritorial force. To do so, were it not overriding our own statute as above explained, would be to fail to conceive the real reason under which decrees of divorce are given interstate and international effect. The decree does not of itself operate as a binding adjudication in other states the same as in the state where it was rendered, but, instead, the decree confers a status upon the divorced parties which, like the status of marriage, is valid everywhere if valid where created. The same rule applies as to marriages. Plaintiff's marriage and divorce were not given extraterritorial force when he moved from Iowa to North Dakota, when recognized here, but his resulting status was recognized in the first instance as that of a married man; and after divorce as that of an unmarried person, under our law conferring upon him the status of an unmarried person under § 4048 of the Code. He is now suing as an unmarried person on the right acquired and existing to him as a property right, a cause of action before his divorce, and before the divorce under the law cast upon him the status of an unmarried person. The doctrine of extraterritorial force has nothing to do with this right or in this case. See 1 Nelson, Divorce, § 32. Then, again, the doctrine of extraterritorial force of decrees of divorce is never applied in cases other than those involving the validity of the decree or some incident dependent thereon, such as arise under the inheritance laws or

under estates by dower or courtesy, or in criminal prosecutions for adultery or bigamy, or civil actions for damages, merely because the action is available to a party formerly married. 1 Bishop, Marr. & Div. chap. 29, and particularly § 966.

Some courts in divorce matters, in considering provisions of statute somewhat similar to our own, providing that neither party divorced shall remarry within a certain length of time, have given extraterritorial force to such provision. Some have not. An investigation of the authorities in this particular shows an irreconcilable conflict between the different jurisdictions. Some statutes provide that this provision of law shall be contained in the divorce decree, and such decree shall recite such prohibitions against remarriage within a statutory period. Other statutes forbidding such relation declare the invalidity of the marriage. Even in the face of such statutes, marriage is contracted without the jurisdiction of the court rendering the decree, and is at time upheld, the courts on the grounds of public policy refusing to give extraterritorial force or effect to such statutes, even when embodied within the decree of divorce itself. The courts declare such statutes penal in nature, and refuse them extraterritorial force.

As examples, however, of the conflicting decisions on this subject, see the following cases cited, only a few among the many, against extraterritorial doctrine, declaring that, if marriage where performed is valid, it is valid everywhere: *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39, affirmed as U. S. rule in 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446; *Re Wood*, 137 Cal. 129, 69 Pac. 900; *Park v. Barron*, 20 Ga. 702, 68 Am. Dec. 641; *Petit v. Petit*, 45 Misc. 155, 91 N. Y. Supp. 979; *Willey v. Willey*, 22 Wash. 115, 79 Am. St. Rep. 923, 60 Pac. 145; *Chase v. Chase*, 191 Mass. 166, 77 N. E. 782; *Van Storch v. Griffin*, 71 Pa. 240; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Ovitt v. Smith*, 68 Vt. 35, 35 L.R.A. 223, 33 Atl. 769; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Phillips v. Madrid*, 83 Me. 205, 12 L.R.A. 862, 23 Am. St. Rep. 770, 22 Atl. 114; *State v. Yoder*, 113 Minn. 503, — L.R.A.(N.S.) —, 130 N. W. 10.

Contrary rule in following jurisdictions: *McLennan v. McLennan*, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; *Eaton v. Eaton*, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 A. & E. Ann. Cas. 199; *Barfield v. Barfield*, 139 Ala. 290, 35 So. 884; *Pennegar v.*

State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683; Scott v. State, 39 Ga. 321; Dupre v. Boulard, 10 La. Ann. 411; Kinney v. Com. 30 Gratt. 858, 32 Am. Rep. 690; Williams v. Oates, 27 N. C. (5 Ired. L.) 535; Tyler v. Tyler, 170 Mass. 150, 48 N. E. 1075, interpreting recent Massachusetts statutes so declaring; Brook v. Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461.

In such class of actions, where the validity of a marriage may directly depend upon the question of extraterritorial effect of the statutory prohibition violated by the remarriage, the refusal of the courts to so apply it is certainly authority to justify a refusal to, by the same doctrine, ingraft the Iowa statute governing Iowa procedure into this action for alienation of affections, in the face of the mandate of our own statute declaring that the plaintiff stands before us clothed with the status of an unmarried person.

As to this novel theory so ingeniously advanced, we cannot agree with defendant. This action on trial was instituted and at issue on the pleadings before plaintiff's wife had acquired a residence in Iowa sufficient to confer jurisdiction on the courts of that state to entertain her petition for divorce. Had this case proceeded to speedy determination, judgment could have been entered herein before the wife could have procured her divorce, in which case defendant's contention certainly could not have been urged, as the facts upon which it is based never would have existed. Then, again, had the wife chosen a state other than Iowa in which to have procured her divorce, the Iowa statute, with that court's construction upon it, would not be before us under the plea that the same should be adopted as the law of this case.

But counsel may urge that this is without the case; that the record has been written and the facts make the case as it is. We reply that the law should not be construed to make the rights of the parties in any case dependent upon a race for judgment between courts in different jurisdictions. Neither should a cause of action based on contract or tort be forfeited except for reasons imperatively demanding such construction; and, further, if our own statute can as reasonably be held to apply to support the cause of action and permit recovery thereon, as to interpolate by construction a foreign statute against an existing cause of action as a bar thereof, we should certainly construe our own statute as applying; to the end that the legislature of this

state, and not foreign statutes, should declare the public policy of this state. Accordingly, the Iowa statute, and likewise that court's construction of it, are in no wise binding upon this court as the law of this case. We have heretofore in this opinion stated that the pleadings and the law upon which the Iowa court's decision in this divorce action was based are not available to the defendant as a defense as *res judicata* against the plaintiff in this action, said divorce not being a proceeding *in rem* to that extent. If such is the case, surely the Iowa statute declaring a mere incident arising from the divorce, as heretofore demonstrated, cannot be extended to this case under any doctrine that a divorce is an action *in rem*. If the issues involved in the divorce case, and the particulars of the judgment aside from divorce, do not under such a doctrine apply, certainly an Iowa statutory penalty there, but a mere result of the divorce, cannot here have force. The contention of the defendant is as unsound as it is unprecedented, as absurd as it is farfetched. Surely the following words of Justice Marshall in *United States v. Fisher*, 2 Cranch, 389, 2 L. ed. 304, apply with force: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects." What a legislature cannot do except by most positive enactment, courts should not do by strained construction. We will not import the Iowa statute for the purposes of this case, to declare a forfeiture of plaintiff's cause of action.

We have precedent from our own state supporting this conclusion. See *Adams v. Hartzell*, 18 N. D. 221, 119 N. W. 635. This case involved the validity of a deed of assignment for the benefit of creditors, executed within the state of Wisconsin in accordance with the provisions of the Wisconsin statutes, purporting to convey real estate in North Dakota. The court, in an opinion by Judge Spalding, holds that the Wisconsin statutes had no extraterritorial effect on the real estate, and that title thereto was not conveyed. We quote from the opinion as follows: "This rule rests upon the well-established principles that the title and disposition of real property are exclusively subject to the laws of the state where it is situated, and that such state alone can prescribe the mode by which the title can pass; that the laws of one state will not be permitted to control the trust, the action of

the trustees, or the disposition of the trust property, in another state, the subject of the trust being real property,—as well as the general principle that the statutes of a state can operate only within the state which enacts them. We cannot attempt to cite all the authorities supporting this, but give a few only.” Citing *Security Trust Co. v. Dodd*, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545; *Townsend v. Cox*, 151 Ill. 62, 37 N. E. 689; *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. 698; *McClure v. Campbell*, 71 Wis. 350, 5 Am. St. Rep. 220, 37 N. W. 345; and other cases. The last case cited was a holding that an assignment in bankruptcy, being administered under the direction of the courts of Minnesota, had no extraterritorial effect, and would not defeat an attachment levied upon property in the state of Wisconsin by creditors of the assignor.

It is asserted that at the time of the divorce in Iowa and thereafter at the time of trial of this action, plaintiff Luick was a resident of and subject to the law of Iowa. The record effectively answers this contention to the contrary. The testimony establishes beyond question his residence in North Dakota from and after 1900 until the time of trial in this case, which was long after the determination of the divorce case in Iowa. This is not a case then where a resident of Iowa has invoked the privileges of our courts in the enforcement of an action for damages. This should be borne in mind in connection with the foregoing discussion of our reasons for refusing to give extraterritorial effect to the Iowa forfeiture statute or that court's construction thereof.

This brings us to the subdivision of this opinion treating of the question of privileged communications between husband and wife, under our statute, § 7253, as governed by the first paragraph thereof and § one (1) thereunder. During the course of the trial touching issues involved under the alleged alienation of the wife's affection, the defendant placed upon the stand the former wife of the plaintiff, which wife has been divorced from the plaintiff since the commencement of this action. Defendant sought by the testimony of the wife to disprove that his acts alienated her affections, and show that the conduct of the plaintiff himself alienated the affections of the marital witness, and brought about the separation, the basis of this action for damages.

The questions asked and the testimony sought to be elicited from the wife under these circumstances involve the construction of the statutes

respecting privileged communications between husband and wife, in the following particulars:

First. To what may the wife testify that is not subject to the husband's objection that the same is privileged?

Second. To what does the husband's privilege extend?

Third. Has the wife the right to refuse to answer, and thereby exclude the testimony otherwise admissible from the case?

Fourth. Had the defendant during cross-examination of the wife witness placed on the stand by him, the right to exclude any portion of her testimony on the ground of the same being a privileged communication between husband and wife?

Under some one of the above phases of the question, all of the assignments of error based on privileged communications fall.

A brief discussion of the statute is in order. The section quoted is in substance that no person offered as a witness in an action or proceeding in any court shall be excluded or excused from testifying because such person is the husband or wife of a party to the action, "except as hereinafter provided: (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

The statute is merely declaratory of the later decisions, modifying the common-law rule as it early existed, then based on the disqualification of the wife witness. Our statute is identical in this respect with Minnesota, Wisconsin, South Dakota, Montana, California, and many other states. The statute declares a privilege only available to the husband or wife as a party or witness, and does not declare a disqualification. The word "privilege" implies an option or a right of waiver. Whatever right is granted as a privilege by the statute can be waived by the party, the husband, and witness, the wife. It is equally apparent that the statute grants the privilege to no one but the husband and the wife. The question, then, is one purely and solely of personal privilege of such persons. Such privilege is the right of the husband as a party to this action, of which he may avail himself as against the testimony of the wife. Likewise, it is the privilege of the wife witness to refuse to disclose communications between herself and husband made during the marriage relation, by law privileged as such, even

though solicited by the husband plaintiff in his cross-examination of the wife witness. The defendant has no right to object on the ground of privilege to any testimony sought of the wife otherwise material, relevant, or competent as proof, the privilege being a personal one and something in which he has no rights. Likewise, to any testimony so admissible given by the wife, solicited by the husband, even though received in violation of the wife's privilege, and, as to her privilege erroneously admitted, the defendant cannot predicate error thereon, nor avail himself of such erroneous ruling on appeal. The question is solely one of privilege, and the privilege is not his. His rights are governed by the rules of evidence relating to the admissibility of the evidence offered and received, and have nothing to do with the personal privilege of husband and wife under the statute.

Let us apply the foregoing reasoning to this case in the concrete. The court, on plaintiff's offer on a foundation laid by the cross-examination of defendant's witness, the wife, and in violation of the statutory provision as to privileged communications, received in evidence a letter of the wife to the husband couched in endearing terms, and expressing and showing her affection for the husband during the time in issue under the evidence and pleadings in the case and, except for the wife's objection on the ground of privilege, admissible as a part of her cross-examination touching matters testified to in her direct examination, and also admissible as testimony of emotions, the existence or nonexistence of her affections being under investigation. The defendant's attorney interposed, among others, the objection that the testimony was that of a privileged communication between the husband and wife, and took exception to the court's reception of the letter in evidence over his objection, and urges the same as error in this court on appeal. For reasons above stated, he has no rights in the matter, and can predicate no error thereon. No right of his has been violated or prejudiced in failing to exclude the proof on the wife's objection, as the proof, had his witness not sustained the relation of wife to the husband plaintiff, would have been admissible.

Defendant in this connection urges that the privilege of the statute extends further than to the husband and wife. This is contrary to the express holding of this court in *St. John v. Lofland*, 5 N. D. 140. 63 N. W. 930, construing the second subdivision of this section of the statute as to testimony for or against executors or representatives of



deceased persons, the companion statutory provision to the one under discussion. In the case cited this court, speaking by Judge Corliss in an opinion based upon the authorities therein cited from the above states having statutes similar or identical with our own, lays down the rule of strict construction of the statute, instead of "entering into an undefined field of inference and conjecture," holding that the statute cannot be extended beyond its express terms.

As authority for the foregoing rules for and construction of this statute, see Wigmore on Evidence, vol. 3, §§ 2196-2243, and cases cited sustaining the text; § 1881, Cal. Code of Civil Procedure, and cases cited thereunder, in vol. 3, Kerr's Cyclopedic Codes of California; *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965; *Clark v. Evans*, 6 S. D. 244, 60 N. W. 862; *St. John v. Lofland*, 5 N. D. 140, 63 N. W. 930; *Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831; *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897; *Sanders v. Reister*, 1 Dak. 151, 170, 46 N. W. 680; *Lloyd v. Pennie*, 50 Fed. 4, 11; *Sexton v. Sexton*, 129 Iowa, 487, 2 L.R.A. (N.S.) 708, 105 N. W. 314; *Arnett v. Com.* 114 Ky. 593, 71 S. W. 635; *People v. Gorsch*, 82 Mich. 22, 46 N. W. 101; 6 Enc. Ev. 892; *Greenl. Ev.* § 333; *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 342, at page 350.

Some of the above cases, as in *Sexton v. Sexton*, where the statute, as in Iowa, does not have the provision relative to consent of husband or wife concerning the giving of testimony as to privileged communications between husband and wife, allow the admission of such testimony in direct contravention of the terms of the statute, on the grounds that the statute was not framed to cover cases of criminal conversation or alienation of affections. In *Sexton v. Sexton*, the court, in speaking of the statute, uses the following language: "Surely it does not lie in the mouth of one who has entered a family circle to dispoil it, to plead the privilege of the statute to the sole end that he may escape the consequences of his unlawful act. It was not intended for his benefit, and every consideration of public policy that enters into it forbids him from making of it a cloak to shield himself from being penalized for the mischief he has wrought." This is going farther than strict construction of the statute, and is certainly authority for a strict construction of it in this class of cases.

In the light of the foregoing, then, the husband could control the  
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admission of communications by law so privileged, when sought to be given by his wife as defendant's witness, subject to the wife's privilege in the matter to be determined, as to which determination the plaintiff only can predicate error on appeal; that the husband can invoke such rule of exclusion as to such privileged communications under such circumstances at his pleasure; that the rights of the defendant as to admissibility of testimony are independent of, and not concerned with, the statute making testimony of husband and wife privileged under certain circumstances. The rights of the defendant, not being concerned therewith, are governed by the regular rules of evidence aside from such questions of privilege.

Defendant's numerous assignments of error, when viewed from this standpoint, are all untenable, and the record as to privileged communications is free from reversible error.

During the trial the court admitted, over objection, the testimony concerning the wife's affections for her husband up to and after the time of the separation, and in so doing admitted, over objections, declarations of the wife made to third persons in the hearing of the defendant, limiting the admission of such testimony to such statements only as evidenced her state of mind, feelings, or emotions. Such testimony was properly admissible. The existence of affection between husband and wife was under investigation. If no affection for the husband existed for years before the separation, then at such time no action for alienation of affections not in existence could be maintained, except possibly under some of the authorities holding that until divorce the husband's right or privilege to, if possible, reconcile the wife to him, is actionable when he is wrongfully precluded therefrom. On such question of affection, declarations to a third party, asserting the existence of the affection, are admissible, so also her declarations to third persons as to her want of affection; the requirement for admissibility being that they be made at a time when there exists no motive to deceive. They are therefore exceptions to the general hearsay rule of evidence.

See 3 Wigmore, Ev. § 1750, and cases cited; 1 Greenl. Ev. § 162D; *Hardwick v. Hardwick*, 130 Iowa, 230, 160 N. W. 639; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614; *King v. Hanson*, 13 N. D. 88, at page 101, 99 N. W. 1085; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Fratini v. Caslini*, 66 Vt. 273, 44 Am. St. Rep.

843, 29 Atl. 252; Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492; Higham v. Vanosdol, 101 Ind. 160; Horner v. Yance, 93 Wis. 352, 67 N. W. 720; Boland v. Stanley, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845.

But such declarations offered as proof of a lack of affection and regard cannot be shown when made after the commencement of the alienating influences complained of, and the above cases are practically all authority to that effect. The reason for the admission of such testimony ceases with the commencement of the alienating influences. But the declarations of the wife, when otherwise admissible under this rule, cannot be admitted in evidence when they carry with them hearsay evidence as to what the husband did or said, and thus make proof by hearsay of his state of mind or his want of affection toward the wife. Her declarations may be admitted to the effect that she does not love her husband, but her declarations of facts or reasons to justify or explain her lack of love are inadmissible and hearsay, the same as a statement to a third party without the presence of the husband that the husband did or said a certain thing. Jones v. Monson, 137 Wis. 478, 129 Am. St. Rep. 1082, 119 N. W. 179; Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845; Boland v. Stanley, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163; Leavell v. Leavell, 122 Mo. App. 654, 99 S. W. 460.

This rule is particularly applicable to this case because the defendant sets up by way of defense a claim that the husband, by abuse in the form of words and physical violence, himself alienated his wife's affections and drove her from home. It is therefore an important and material issue in the action whether the husband's conduct was of such character as to naturally tend to alienate the wife's affections and accomplish such results. As to this, much testimony in the form of depositions was offered, tending to show statements of the wife made to her relatives and friends in Iowa, of specific acts of abuse and mistreatment of her by her husband, and it was sought to thus by hearsay establish such as facts tending to show that the plaintiff alienated the affections of his wife thereby, not by the testimony of any witness who saw acts or heard words, but by the repetition of statements made by the wife not in the presence of the plaintiff. All testimony of this character was properly excluded under the above authorities and Derham

v. Derham, 125 Mich. 109, 83 N. W. 1005; Roesner v. Darrah, 65 Kan. 599, 70 Pac. 597; Preston v. Bowers, 13 Ohio St. 12, 82 Am. Dec. 430; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845; Boland v. Stanley, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163.

The court admitted certain documents and letters under the above rules of evidence, but protected the rights of the parties by instructing the jury that the evidence was admissible only for the specific purpose for which it was offered, and that the same could not be considered as proof of the substantive facts contained in such exhibits. This was proper.

King v. Hanson, 13 N. D. 85, 99 N. W. 1085; Hardwick v. Hardwick, 130 Iowa, 230, 106 N. W. 639; Magers v. Magers, 143 Iowa, 750, 123 N. W. 330; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Dalton v. Dregge, 99 Mich. 250, 58 N. W. 57; 16 Cyc. 1146 and 1184.

The exceptions taken to this line of testimony, as well as to the court's instructions concerning the same, cannot be sustained.

Many assignments of error are urged to the instructions of the court on motive, malice, and presumptions relative thereto, arising by law from the relationship by marriage of the defendant to plaintiff, his former wife, and family. The court instructed the jury as to the law applying to the acts of a stranger in interfering with the family of another by advice or encouragement or solicitation of the wife to leave the husband; and also gave full instructions as to the rights of blood or near relatives to counsel, encourage, or assist, and participate in the separation of husband and wife. While the instructions may be subject to criticism, and certain portions taken alone might be considered erroneous, we are not prepared to hold that the judgment should be reversed on instructions alone. We are satisfied that it was proper to instruct the jury as to both phases of the case under the testimony, and allow the jury to determine whether the defendant was entitled to the exemption from liability accorded relatives in interfering in the affairs of husband and wife. Such questions usually have arisen in cases where parents have given advice in the domestic affairs of married children. The law recognizes the right of the parent, brother, sister, or near blood relative so to act when prompted by proper motives, without malice and for the supposed welfare of the party counseled. The reason for the rule rests on presumptions arising from the relation-

ship itself. The law but recognizes the natural affection of the parent for the child, and applies the ordinary presumption of fact that the parent so acting is free from bad faith or unworthy motives. What is true of the parent is true of the child, when advice is given by the child to the married parent. As illustrative, see *Hutcheson v. Peck*, 5 Johns, 198; *Bennett v. Smith*, 21 Barb. 439; *Payne v. Williams*, 4 Baxt. 583; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310, 33 N. E. 638; *Barton v. Barton*, 119 Mo. App. 507, 94 S. W. 574; *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 270; *Bennett v. Burkhead*, 21 Ark. 77, 76 Am. Dec. 358; *Avery v. Avery*, 110 Iowa, 741, 81 N. W. 778; *Eagon v. Eagon*, 60 Kan. 697, 57 Pac. 942; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989; *Leavell v. Leavell*, 122 Mo. App. 654, 99 S. W. 460; *Tasker v. Stanley*, 153 Mass. 148, 10 L.R.A. 468, 26 N. E. 417; *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187; *Sheriff v. Sheriff*, 8 Okla. 124, 56 Pac. 960; *Philp v. Squire*, Peake, N. P. Cas. 82, 3 Revised Rep. 659; *Schuneman v. Palmer*, 4 Barb. 225; *Turner v. Estes*, 3 Mass. 317; *Campbell v. Carter*, 6 Abb. Pr. N. S. 151; *Smith v. Lyke*, 13 Hun, 204; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 797; *Wood v. Mathews*, 47 Iowa, 409; *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598; 12 Cyc. 1620; 1 Bishop, Divorce, § 1563; *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479.

But a stranger stands on different ground entirely. Ordinarily, the very proof of the affection of the stranger for the wife, or *vice versa*, raises the contrary presumption from that presumed from the affection naturally existing between parent and child. With the disappearance of the reason for the rule, the rule itself should fall. "In case of a stranger in blood, the causes must be extreme that will warrant him in interfering with the relation of husband and wife. If he by advice or enticement induces a wife to leave her husband, or takes her away with or without her consent, and encourages her to remain from him, or harbors and protects her while away from him, he does these things at his peril, and the burden is on him to show good cause and good faith for his conduct." *Boland v. Stanley*, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163; *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 382; *Hutcheson v. Peck*, 5 Johns. 196. "It would seem upon principle to be rare indeed if the motive of a stranger in breaking up a family could be a good one." *Rodgers*, Dom. Rel. § 176; 1 Jaggard,

Torts, 467; Tiffany, Persons & Dom. Rel. 76; Schouler, Dom. Rel. 41, and cases cited by these. The testimony discloses facts, including correspondence, from which the jury might have concluded a natural friendship and confidential relationship existed between the wife and the defendant, especially in view of the fact of her letters to defendant's wife, her sister, requesting defendant's advice and assistance. Accordingly, the instructions given, leaving to the jury the application of the law according as they found the facts to exist, was proper, and not prejudicial to the rights of either party.

Defendant maintains that the evidence shows the husband freely consented to the separation, and calls attention to the familiar rule of law that ordinarily no one can maintain an action for a wrong when he has consented or contributed to the acts which caused the loss, and asserts that the husband's consent given to the wife's acts constituted a bar to this action for alienation of the wife's affections. 21 Cyc. 619; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731; *Milewski v. Kurtz*, 77 N. J. L. 132, 71 Atl. 107; *Reading v. Gazzam*, 200 Pa. 70, 49 Atl. 889; *Hedden v. Hedden*, 21 N. J. Eq. 74; *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343; *Woldson v. Larson*, 90 C. C. A. 422, 164 Fed. 422; *Buckel v. Suss*, 28 Abb. N. C. 21, 18 N. Y. Supp. 719, s. c. in 21 N. Y. Supp. 907.

Defendant also insists that the evidence taken in its entirety is insufficient to sustain any verdict against him, in that the plaintiff is so impeached and discredited as to render his entire testimony, except where corroborated by credible evidence, unworthy of belief; and that such corroboration is insufficient in many material matters. Plaintiff's testimony constitutes one-fourth of the entire record. With it eliminated except where so corroborated, a recovery cannot be sustained. For over four months this case has been under consideration by this court, and every phase of the testimony bearing on these questions, as well as on all others involved in the case, has been carefully discussed and considered, resulting in a majority of this court having reached the conclusion that from the record the judgment of this court should be pronounced that determination of the jury in plaintiff's favor on the facts was erroneous, in that plaintiff was not entitled to belief, and that the verdict should be set aside; in which conclusion, however, the writer of this opinion cannot and does not agree. But as a dissent on the facts by a single member of the court elucidates no legal principle,

and is really of no effect, the writer concurs in this opinion prepared by him announcing the decision of this court. Accordingly, without an attempted analysis of the conflicting testimony, this court holds the testimony of the plaintiff to be unworthy of belief, insufficient to sustain the verdict, in that, in the absence of proof of the facts which plaintiff's testimony tends to establish, no alienation of the affections of the wife by the defendant, or separation of husband and wife by him, or at his procurement, or as a result of his influence, is established; without taking into account plaintiff's testimony, it appears that plaintiff practically consented to the separation. The written proof establishes that he and wife signed a division of property and made a written agreement as to the custody of the children thereafter. In evidence is a letter purporting to be written by plaintiff to defendant some weeks after separation, thanking defendant for his assistance in adjusting affairs between plaintiff and wife. This letter purports to be signed by plaintiff, and a postmarked envelop strongly corroborative of the mailing thereof from plaintiff's address in this state, to defendant in Iowa, is in evidence. Plaintiff, however, strenuously denies signing or having any knowledge of the letter, and brands it by his testimony as manufactured evidence. This letter, if written by him, would practically establish plaintiff's consent to the doing by the defendant of the acts done and the steps taken by defendant in the final chapter closing the domestic relations of Luick and wife, and tends to absolve defendant from liability.

We will in conclusion pass upon a question of practice in disposing of a remaining assignment of error. In his main case plaintiff called defendant for cross-examination under the statute governing examination of the adverse party, elicited certain information and dismissed the adverse party witness. Defendant's counsel then sought to explain the testimony so elicited under cross-examination, by redirect examination immediately following, and as a part of plaintiff's case. The ruling of the court on plaintiff's objection, excluding such redirect examination, was proper. There is no provision in the statute for the examination proposed by defendant's counsel. While it is a question of practice largely discretionary with the court, the better practice is to keep separate the two sides of the case, and compel defendant to delay testimony in explanation of his cross-examination until defendant offers proof under his main case. This rule has the sanction of supreme court

decision under a similar statute in Minnesota, in *Miller v. Carnes*, 95 Minn. 179, 103 N. W. 877, and cases therein cited.

This case might have been disposed of on the single assignment of insufficiency of the evidence to justify the verdict, but the exhaustive briefing of the case by all counsel concerned, as well as the time taken in the discussion, review, and consideration of the case in all its details by this court, we urge as our reasons for this extended opinion where a brief one might have sufficed.

The judgment appealed from is ordered reversed, and the case remanded for new trial or further proceedings.

MORGAN, Ch. J., not participating.

SPALDING, J.: I concur without expressing any opinion on the subjects covered by paragraphs 6 and 7 of the syllabus.

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## W. R. DITTON v. ED. PURCELL.

(36 L.R.A.(N.S.) 149, 132 N. W. 347.)

### **Sales — Fraud — Rescission.**

1. A purchase of personal property with the undisclosed intent to not pay the purchase price is a fraud upon the seller, for which he may within a reasonable time rescind the sale and retake possession of the property sold.

### **Sales — Fraud.**

2. The giving of a false and fraudulent check in payment of the purchase price of personal property, with the intent that, after obtaining possession of the property by such means, the notes of the seller barred from collection by bankruptcy would be offset against the purchase price, without the consent of the seller, or a discount from the purchase price forced in settlement, is a fraud on the seller, for which he may rescind the sale and recover his property.

### **Sales — Fraud — Rescission.**

3. Such a fraudulent sale passes to the defrauding purchaser a title voidable at the option of the seller, if rescinded with reasonable promptness after discovery of the fraud.

### **Sales — Fraud — Bona Fide Purchaser — Burden of Proof.**

4. A bona fide purchaser of personal property from such fraudulent original purchaser may secure perfect title to the property so purchased. But, his vendor's fraudulent acquisition of the property being once established, the burden is on the subpurchaser to prove his good-faith purchase without knowledge of fraud or acts imputing notice sufficient to put the subpurchaser on inquiry as to



the fraud of his vendor; otherwise he takes no title superior to that possessed by his vendor, a voidable one at the option of the original seller. After proof of the fraud of the buyer in the original sale, the burden is not on the seller to further prove the weakness of the subvendee's title, by showing his fraudulent purchase or his purchase with notice of his vendor's fraud.

**Appeal and Error — Objection in Court Below — Amendment.**

5. Where trial is had and judgment entered on findings sufficient to sustain such judgment, this court will not on appeal review the sufficiency of the pleadings unchallenged in the court below, when such defects could have been remedied by amendment, had suitable objection been made at the trial.

Opinion filed July 26, 1911.

Appeal from District Court, Grand Forks county; *Templeton*, Judge. Action by W. R. Ditton against Ed Purcell. From a judgment for plaintiff, defendant appeals.

Affirmed.

*George A. Bangs*, for appellant.

Ostensible ownership acquired by fraud, until rescission, is an ownership that can pass title to a bona fide purchaser for value without notice. 24 Am. & Eng. Enc. Law, 2d ed. 1165-1166; 4 Am. & Eng. Enc. Law, Supp. 2d ed. 751; 5 Am. & Eng. Enc. Law, Supp. 2d ed. 1715; *Cochran v. Stewart*, 57 Minn. 499, 59 N. W. 543; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190; *Young v. Bradley*, 68 Ill. 553; *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Dec. 626; *Parker v. Daxter*, 19 Hun, 410; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *Hoffman v. Noble*, 6 Met. 68, 39 Am. Dec. 711; *Shufeldt v. Pease*, 16 Wis. 659; *White v. Dodge*, 187 Mass. 449, 73 N. E. 549; *Gardner v. Beacon Trust Co.* 190 Mass. 27, 2 L.R.A.(N.S.) 767, 112 Am. St. Rep. 303, 76 N. E. 455, 5 A. & E. Ann. Cas. 581; *Rowley v. Bigelow*, 12 Pick. 306, 23 Am. Dec. 607.

*Scott Rex*, for respondent.

The sale was void, or at least voidable, and could be rescinded. *Chicago, B. & N. R. Co. v. L. T. Sowle Elevator Co.* 44 Minn. 224, 9 L.R.A. 263, 46 N. W. 342, 560; *Amer v. Hightower*, 70 Cal. 440, 11 Pac. 697; *Lee v. Simmons*, 65 Wis. 523, 27 N. W. 174; *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908; *Carter, R. & Co. v. Cream of Wheat Co.* 73 Minn. 315, 76 N. W. 55; *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75, 30 N. W. 440; Rev. Codes, 1905, § 5711.

Appellant was not a good-faith purchaser of the horses. *Chicago, R. & N. R. Co. v. L. T. Sowle Elevator Co.* 44 Minn. 224, 9 L.R.A. 263, 46 N. W. 342, 560; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *Cochran v. Stewart*, 21 Minn. 436; *Cochran v. Stewart*, 57 Minn. 499, 59 N. W. 543; *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Globe Mill. Co. v. Minneapolis Elevator Co.* 44 Minn. 153, 46 N. W. 306; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813, 23 Am. & Eng. Enc. Law, 1137, 1166, 1169; *Wendling Lumber Co. v. Glenwood Lumber Co.* 153 Cal. 411, 95 Pac. 1029.

Burden of proof to show good faith was on the purchaser. *Starr Bros. v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Whitaker Iron Co. v. Preston Nat. Bank*, 101 Mich. 146, 59 N. W. 395.

Goss, J. Defendant, Purcell, and one Murphy, attended plaintiff's auction sale at which plaintiff's team was struck off to Murphy on his bid of \$302. At the close of the sale, defendant and Murphy secured possession of the horses, and were about to drive away with the team without settling for it, when plaintiff again took possession of the horses. Plaintiff had some time previously gone through bankruptcy, and Murphy attended the sale and bid in the horses evidently intending to secure possession of them and afterwards, on settlement, pay for them in whole or in part by turning in plaintiff's promissory notes, collection of which notes was barred by the bankruptcy proceedings. Plaintiff, anticipating this, told Murphy in defendant's hearing that "you don't get those horses until you settle for them; them old notes don't go at all; you have either got to pay the cash for the horses or put on gilt-edged security." Murphy then gave his check to plaintiff for the full amount of the purchase price, running to plaintiff as payee. Thereupon, plaintiff delivered the horses to Murphy in Purcell's presence, and the two rode away leading the horses behind, taking them to the defendant's home. Purcell testifies that he surmised that Murphy had some of Ditton's old notes at the time the horses were taken from him and replaced in the barn, before Murphy gave the check. Purcell had known Murphy twelve years. Murphy was working for one Bennett at the time.

That night Purcell and his neighbor Lundberg had a talk about Murphy's paying for the horses, in which Lundberg told Purcell that

he "didn't see how Murphy could get out of paying for the team because he gave his check for it," to which Purcell replied that "he didn't know whether it was a check; he thought it was only an order," or that in substances. Lundberg immediately related this to one McGiliveray, who communicated the statement to plaintiff the morning after the sale. Plaintiff, on the day after the sale, presented the check to the bank and payment was refused. The night of the sale Murphy had told the cashier of the bank not to send the check in until he, Murphy, got over, and the next morning Murphy came to Gilby and was in the bank when the check was presented for payment and dishonored, following which an offer was made by Murphy and the banker to settle the matter if plaintiff would discount the price of the horses \$75 or \$100, which plaintiff refused to do. Murphy then attempted to turn in the old notes of respondent, barred by bankruptcy proceedings, but to this plaintiff would not consent, and, no settlement being arrived at, plaintiff returned to Murphy the worthless check given the day before in settlement. Murphy explained to the banker that in giving the check "he considered that he was giving an order," "that it was an order until such time as he could come in and make settlement." He had left the old notes before this with the bank.

Defendant claims to own the horses; testified that he bought the horses paying for them the second day after the sale by a check to Bennett, with whom Murphy had previously arranged by telephone that such payment would be made; that he paid Bennett \$230 for the team, of which payment Murphy received the benefit. Eight days after the sale, plaintiff informed defendant that he refused to recognize any rights of Murphy under the sale, and demanded the horses; to which defendant replied that "he expected that, as Murphy told him not to give them up, to stand pat." Defendant explains this by testifying that as soon as he found out there was trouble about his deal with Murphy, that he told Murphy that he wanted him to stand back of the deal or give him his money. Murphy agreed to stand back of the deal, and told him to "stand pat." Defendant was present at the sale and knew what Murphy had bid for the team. Defendant alleges that he had no notice of any rights of the plaintiff in the deal at the time of his purchase, or that plaintiff claimed any interest in the horses.

It is apparent from the testimony that the sale to defendant by Mur-

phy, and the arrangement for payment by Purcell to Bennett of the \$230 for the team, were made on or before the night following the auction sale. It also appears that, although defendant denies any knowledge of any rights of Ditton in the team, yet, if the testimony of Lundberg be true, Purcell must have known the check received by plaintiff on the sale as payment was either bogus or, as defendant terms it, "only an order." The facts occurring the day after the sale verified defendant's statement as to the check being but an order, and harmonize with Murphy's statement to the bank that he considered it but an order with the settlement to follow, in which he, Murphy, should obtain a discount from the purchase price bid or force Ditton to accept in part payment some of his old notes barred by bankruptcy. Where did Purcell get his advance knowledge that the check was but an order, except from Murphy? The auction sale commenced after dinner, and that same night defendant is in possession of the horses under his claim of good-faith purchase. So, within a few hours at most of the time of the purchase of the horses at auction sale, Purcell is evidently familiar with Murphy's scheme to defraud plaintiff, commenced at the auction and consummated by nonpayment the next day. With this knowledge defendant paid his money for the team two days afterwards. In spite of this defendant now contends that the ostensible ownership of the horses was conferred upon Murphy by the delivery of the horses in defendant's presence to Murphy; and that defendant, relying upon the title of the horses being in Murphy, purchased them of Murphy in good faith, and without notice of any claim or right of plaintiff in the horses, and that the loss, if any, should fall upon plaintiff; that plaintiff failed to rescind the sale within a reasonable time after discovery of the fraud, and is precluded thereby from recovery.

The acts of Murphy were clearly a fraud upon the plaintiff. Murphy bid in the horses with no intent to pay the amount of the bid. He intended to turn in the old notes of Ditton on the purchase price; he had previously made arrangements with the bank to do this, as is shown by his leaving the old notes with the bank, evidently that they might be in readiness if their payment was obtained in settlement. He gave the check intending it not as payment, as plaintiff believed it to be, but rather as the means of bringing plaintiff to the bank, where such a settlement could be forced and something realized on the notes otherwise uncollectable. By such deceit he obtained possession

of the team without paying any value for them, and with the present intent not to pay the purchase price. A purchase with such intent is a fraud on the seller under all authorities, because of which the seller may, if he so elects within a reasonable time, rescind the sale and recover the property so obtained by the fraud of the buyer; but until such rescission, the voidable sale remains such with voidable title in the purchaser. *Mechem, Sales*, §§ 148, 889, 891, 892, 901, 907; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993, and note; *Fechheimer v. Baum*, 2 L.R.A. 153, and note (37 Fed. 167); *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 685; *King v. Jacobson*, 35 N. Y. S. R. 808, 12 N. Y. Supp. 584; See also vol. 8 of *Rose's Notes of U. S. Reps.* 1024; 23 *Century Dig. Col.* 174 et seq.; 17 *Decen. Dig.* 42 and 44.

The purchase being therefore fraudulent, and the sale voidable at plaintiff's option, if rescinded with reasonable promptness, the burden of proof of better title in the purchaser than his fraudulent vendor possessed rests upon the defendant, who may prove good title in himself by proof, by a preponderance of evidence, of his purchase of the team for an adequate consideration in good faith, without knowledge of his vendor's fraud, and without notice of any fraudulent acts or intent of his vendor, or knowledge of facts sufficient to put defendant or a reasonably prudent man on inquiry as to the existence of the fraud in the purchase and sale by which defendant's vendor obtained the property. Such a purchase, without knowledge of fraudulent act or intent, or of acts imputing notice sufficient to compel inquiry, would constitute defendant a bona fide purchaser for value, and confer upon him perfect title to the property in question. But the burden of proof to establish such good-faith purchase is upon the subvendee, defendant, who is claiming a perfect title after it has been established that his vendor had but a voidable title. When defendant sets up, as he does by his claim of good-faith purchase, better title than his vendor had, the burden of proving his superior title is assumed by and falls upon the defendant as the party asserting it, such vendor's fraudulent acquisition of the property being once established. The burden therefore, is not on plaintiff to prove the weakness of defendant's title, by proving fraudulent purchase or purchase with notice of defendant's vendor's fraud. The great weight of authority upholds this rule as

to burden of proof, and the only conflict is as to the degree of proof required of the vendee to meet or satisfy such burden resting upon him.

Easter v. Allen, 8 Allen, 7; Gowing v. Warner, 29 Misc. 593, 61 N. Y. Supp. 500, same case in 30 Misc. 593, 62 N. Y. Supp. 797; Haskins v. Warren, 115 Mass. 514; Moyer v. Bloomingdale, 38 App. Div. 227, 56 N. Y. Supp. 991; Devoe v. Brandt, 53 N. Y. 462; Seymour v. McKinstrey, 106 N. Y. 240, 12 N. E. 348, 14 N. E. 94; King v. Jacobson, 35 N. Y. S. R. 808, 12 N. Y. Supp. 584; Strickland v. Leggett, 50 N. Y. S. R. 451, 24 N. Y. Supp. 356; Blake v. Blackley, 109 N. C. 257, 26 Am. St. Rep. 566, 13 S. E. 786; Smith v. Young, 109 N. C. 224, 13 S. E. 735; Morrow Shoe Mfg. Co. v. New England Co. 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 685; Letson v. Reed, 45 Mich. 27, 7 N. W. 231; Berry v. Whitney, 40 Mich. 65; Whitaker Iron Co. v. Preston Nat. Bank, 101 Mich. 146, 59 N. W. 395; Shotwell v. Harrison, 22 Mich. 410; Benjamin, Sales, note p. 446; Starr Bros. v. Stevenson, 91 Iowa, 684, 60 N. W. 217; Sillyman v. King, 36 Iowa, 207; Schulein v. Hainer, 48 Kan. 249, 29 Pac. 171; Bughman v. Central Bank, 159 Pa. 94, 28 Atl. 209; Levy v. Cooke, 143 Pa. 607, 22 Atl. 857; Hoffman v. Noble, 6 Met. 68, 39 Am. Dec. 711; Harner v. Fisher, 58 Pa. 453; 43 Century Dig. Col. 959, 980, 984, 986, et seq.; Fomby v. Colquitt, 56 Ark. 537, 20 S. W. 413; Sargent v. Strum, 23 Cal. 359, 83 Am. Dec. 118; Hanchett v. Kembark, — Ill. —, 2 N. E. 512, 516; Leedom v. Ward Furniture, Stove & Carpet Co. 38 Mo. App. 425; McLeod v. First Nat. Bank, 42 Miss. 99; Wafer v. Harvey County Bank, 46 Kan. 597, 26 Pac. 1032; Kilpatrick-Koch Dry Goods Co. v. Kahn, 53 Kan. 274, 36 Pac. 327; Reid, M. & Co. v. Bird, 15 Colo. App. 116, 61 Pac. 353. Alabama holds the contrary. See Spira v. Hornthall, 77 Ala. 137; Roswald v. J. F. Imbs & Co. 78 Ala. 315; Kyle v. Ward, 81 Ala. 120, 1 So. 468; Hoyt & Bros. Mfg. Co. v. Turner, 84 Ala. 523, 4 So. 658; Scheuer v. Goetter, 102 Ala. 313, 14 So. 774.

Instead of having met such burden of proof cast upon him, the evidence in the case raises a strong inference of defendant's complicity in the fraudulent purchase, sufficient, at least, to have permitted the case to have been submitted to a jury on that score, had the case been tried to a jury instead of to the court. If defendant did not actually participate in the fraud through which Murphy procured the team, there is evidence that he knew of the fraudulent nature of the trans-

action and Murphy's intent not to pay except by offsetting the old notes against the debt; and if he did not actually purchase with full knowledge of such fraud, he paid his money possessing sufficient knowledge thereof to have put him, as a reasonably prudent man, on inquiry as to the fraud, before making payment. The evidence can be construed as conflicting on these particulars, but the findings thereon of the trial court against defendant's claims are as conclusive on the facts as a jury verdict would have been.

But defendant contends that even if Murphy did intend to collect the old notes in settlement, and with such intent bid in the horses, it was nothing immoral or unconscientious, and did not amount to a fraud; that the bankruptcy had not removed the moral obligation of plaintiff to pay his notes held by Murphy, and that common honesty required plaintiff to accept the notes in payment for said horses, if tendered by Murphy for said purpose. It is true that the bankruptcy proceedings but barred the remedy, and left the debt remaining unsatisfied, and morally as binding upon the plaintiff as his obligation though the bankruptcy proceedings had never been had; but it is with the legal phase of the question we are dealing. So far as collection of the note by machinery of law was concerned, plaintiff was discharged from legal obligation to pay the debt; and payment for the horses could not be made by offsetting the old notes against the purchase price, without the express consent of plaintiff. This plaintiff positively at all times refused to give, and, to head off such a claim, retook possession of the horses, and delivered them to Murphy only on payment by check of the full purchase price, the supposed equivalent of a cash settlement for the horses. As is said in a very similar case, *Harner v. Fisher*, 58 Pa. 453: "The same excuse might, with the same plausibility, have been urged if he had taken the beast by force or in the nighttime. A creditor has no more right to defraud his debtor into parting with his property for his benefit than anybody else; and the latter is as well entitled to the privilege of assenting to the disposition of it, when it is not taken by law, as other persons." The fact remains that plaintiff was deceived and defrauded into parting with his property by the falsehood and deceit of Murphy, clearly apparent from the circumstances surrounding the whole transaction, particularly the giving of the bogus check in payment of the purchase price of the property, by means of which, and not otherwise, pos-

session thereof was delivered to Murphy. The gravamen of the fraud was in wilfully and deceitfully creating the impression on the mind of plaintiff that the check was valid and would procure the cash according to its terms on its being presented for payment. Its delivery to plaintiff with the contrary false and fraudulent intent in Murphy, with the knowledge of its worthlessness, and the obtaining thereby of the team, was the equivalent of the obtaining of such property under false pretenses. If citations in support of this reasoning are needed, see *Blake v. Blackley*, 109 N. C. 257, 26 Am. St. Rep. 566, 13 S. E. 786, in which, in a somewhat similar case, the court uses the following language: "A creditor is not allowed, by practising a fraud, to acquire title to the property of his debtor, even with the purpose of crediting its value on a just debt. . . . If the law should give its sanction to the wrongful conversion of property, whether by force or fraud, for the purpose of collecting even undisputed debts, the end would not justify the means, either legally or morally."

As to the promptness with which plaintiff rescinded the sale, he acted with reasonable diligence. Payment was made by defendant the day after plaintiff became aware of the fraud practised upon him. A week afterward he gave notice of rescission to defendant. As to Murphy, the sale was rescinded the day after the auction, and the check returned. Even though defendant was a good-faith purchaser, plaintiff acted with sufficient diligence. If he was a party to the fraud, of which there is evidence, defendant certainly cannot complain that his own fraud resulted to his injury, or that plaintiff took a week's time in which to determine how to protect his rights in the matter.

Defendant also urges that plaintiff's complaint does not state a cause of action. Defendant cannot now be heard to urge this assignment. He answered the complaint, went to trial, litigated the action on the merits, and findings were found sufficient upon which to base the judgment rendered, and thereon judgment accordingly was entered. The sufficiency of the complaint was first challenged on motion for new trial. Prior thereto the parties and the court treated the complaint as sufficient, and if any defect therein existed it is cured by the findings found and judgment entered, without the sufficiency of the complaint being brought in issue. Attacks on pleadings made for the first time in this court are not looked upon with favor, and will not be sustained if the pleading liberally construed is good, or if the defects could have



been remedied by amendment in the court below. Conceding the complaint to be defective, it could have been amended, had its sufficiency been questioned prior to judgment. This is not new doctrine in this court. See *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, 64 N. W. 943; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851; *Gooler v. Eidsness*, 18 N. D. 338, 121 N. W. 83.

This disposes of all assignments of error urged for our consideration adversely to appellant. The judgment appealed from is ordered affirmed.

All concur, except MORGAN, Ch. J., not participating; A. G. BURR, Judge of the Ninth Judicial District, sitting by request.

21 N. D.—42.



# INDEX.

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**ABATEMENT.** See Intoxicating Liquors, 444.

**ABUSE OF DISCRETION.** See Discretion, 128, 222, 235, 359, 602.

Whether a motion to make an information more definite may ever be granted as a matter of right, not determined, but if permissible, there was no abuse of discretion in denying such motion in this case. *State v. Hakon*, 133.

## **ACCESSIONS.**

It is *held* that under the facts of this case it is unnecessary to decide whether § 4752, R. C. 1905, which provides that the owner of a thing owns all its products and accessions, establishes title to grain raised on land and severed therefrom by one holding possession thereof after forfeiture of an executory contract of purchase, in the vendor as against his vendee, when such vendor has never been in possession of the land; but a review of the authorities discloses them overwhelmingly in favor of ownership in the grower of the crop. *Golden Valley L. & C. Co. v. Johnstone*, 101.

## **ACCOUNT.**

1. Under the facts of this case, *held*, in the absence of fraud or mistake, it will be presumed that accountings and settlements were fairly made and embraced all prior transactions between the parties. *Held*, further, that burden is on defendant to overthrow such presumptions in which they have failed, and to show that such settlements were erroneous in respect to any item in the account. *Wood v. Pehrsson*, 357.
2. On the trial plaintiff accounted for all transactions between the parties which occurred subsequent to the July 15, 1903, settlement, and from a consideration of the testimony it is *held*, that there was a balance due plaintiff on January 1, 1906, of \$3,900.97, and that, to the extent of such sum, with interest, plaintiff has a lien under the chattel mortgage in suit, and is entitled to a foreclosure thereof, as prayed for in his complaint. *Wood v. Pehrsson*, 357.

**ACTION.** See Parties, 383; Practice, 287; Quieting Title, 290.

1. Recovery of a judgment against the debtor, in a suit at law, does not waive the right to a lien nor bar an equitable action to enforce the same. *Erickson v. Russ*, 208.
2. While foreclosing his mortgage in an appropriate action, plaintiff has the right to maintain an action to quiet title based upon his quitclaim deed, and it is error for the trial court to force him to elect between the two actions. *May v. Cummings*, 287.
3. When a use plaintiff brings suit to quiet title in the name of his grantor, he must rely upon the title as of the date of the transfer from the nominal plaintiff to him. *Hanitch v. Beiseker*, 290.
4. An action begun as an equitable action may, by subsequent pleadings, be changed in nature to one at law properly triable on demand to a jury. *Hart v. Wyndmere*, 383.
5. If such action between many parties, even though of conflicting interest, is but a combination of two or more separate actions at law, the action is not necessarily changed from one at law to one in equity because of such voluntary consolidation of issues by the parties. *Hart v. Wyndmere*, 383.

**ADVERSE CLAIMS.** See Action, 287; Pleading, 97; Quieting Title, 25, 290; Vendor and Purchaser, 101.

1. Secs. 7520 and 7534, R. C. 1905, define the nature of the recovery which may be had by plaintiff in actions to determine adverse claims to real property; and a plaintiff who has proceeded under the provisions of said chapter can only recover a money judgment for the value of the use and occupation, except when he shows damages by waste or removal of the property from the premises. *Golden Valley L. & C. Co. v. Johnstone*, 101.
2. On an appeal in an action to determine adverse claims, where the judgment roll only is before the supreme court, and it appears by defendant's counterclaim that the tax deed under which he claims and is in possession is a valid tax deed, and the findings show that all tax proceedings were in accordance with the statute, and that all the grounds urged by plaintiff to show defects in the tax proceedings do not exist,—*held*, that defendant's title is valid, and that the deed under which he claims vested a complete title in him, and that the deed under which the plaintiff claims conveyed nothing. *Murray v. Lamson*, 125.

**AFFIDAVIT.** See Attachment, 344; District Judge, 444; Judgments, 198, 222; New Trial, 551; Voters and Elections, 245.

1. Affidavits of prejudice directed at the judge of the district court, and not

**AFFIDAVIT**—continued.

- filed before the commencement of the term at which the case is to be tried, are of no effect, and do not deprive the judge of the right or power to try the action in which such affidavits are filed during the term time. *Stockwell v. Crawford*, 261.
2. Where the attachment is sought under subparagraph 8 of § 6938, the property must be described specifically. It is not enough to tell where the goods are, but definite allegations must be made showing what they are. *Weil v. Quam*, 344.
  3. A subsequent mortgagee may make the necessary affidavit and enjoin the sale. *State v. Buttz*, 540.
  4. The affidavit upon which the restraining order is based should set forth the facts, for the satisfaction of the judge of the district court, but the facts need not be stated with the same particularity required of pleadings. The affidavit in this case examined, and, *held*, sufficient to confer jurisdiction. *State v. Buttz*, 540.
  5. An application to reopen a judgment must be accompanied by an affidavit of merits. Such affidavit of merits may set up all of the facts of the case, and be presented to the court itself for an inspection of the merits. It is not necessary that the client submit the facts to an attorney upon the merits. *Bismarck Grocery Co. v. Yeager*, 547.

**ALIMONY.** See Divorce, 503.

**AMENDMENT.** See Pleading, 235, 359.

**ANIMALS.** See Criminal Law, 133.

**ANSWER.** See Pleading, 359.

**APPEAL AND ERROR.** See Certiorari, 476; Criminal Law, 179; Evidence, 305; Indictment and Information, 179; Justice of Peace, 348; New Trial, 377; Sales, 478; Trial, 335, 569.

1. A notice of appeal to this court is sufficient that states that the appeal is from an order, fully describing it, although it does not state that it is from the whole of the order, in accordance with the provisions of the statute. *State v. Bleth*, 27.
2. Failure to follow § 7325, R. C. 1905, by enumerating, in an order, all papers on which it is based, does not warrant a dismissal of an appeal from such order. *State v. Bleth*, 27.
3. Payment of costs to the clerk, under an order, which are not accepted by

## APPEAL AND ERROR—continued.

- the appellant, is no ground for the dismissal of the appeal. *State v. Bleth*, 27.
4. Where the record fails to disclose what items of cost and disbursements were incurred, the supreme court will not review the taxation by the trial court. *State v. Winbauer*, 70.
  5. On demurrer to the complaint solely for improper union of several causes of action, it is contended on appeal from an order overruling such demurrer that the complaint does not state a cause of action, and the order overruling the demurrer should be reversed. *Held*, this question is not before the court. *Golden Valley L. & C. Co. v. Johnstone*, 97.
  6. In an action for damages for conversion of grain by a common carrier, intrusted to it for transportation, one of the defenses relied upon by appellant was that the grain did not belong to the plaintiff consignor, but was the property of one C. In attempting to make proof of such ownership after proper foundation laid, and after C. had testified that the grain all belonged to plaintiff, C. was interrogated as to whether he had made statements to the effect that he owned the grain. *Held*, that such questions were proper as going to the credibility of C. as a witness, when offered for that purpose, and that it was reversible error of the trial court to sustain objections to such questions. *Taugher v. N. P. Ry. Co.* 111.
  7. A justice's summons bore date two days after the date of filing with the justice of the complaint, affidavit, and undertaking for attachment, and issuance of the writ of attachment. *Held*, that on the offer of such papers in evidence in an attempt to show that they were simultaneously issued, it was not error to exclude them from evidence. *Taugher v. N. P. Ry. Co.* 111.
  8. On an appeal in an action to determine adverse claims, where the judgment roll only is before the supreme court, and it appears by defendant's counterclaim that the tax deed under which he claims and is in possession is a valid tax deed, and the findings show that all tax proceedings were in accordance with the statute, and that all the grounds urged by plaintiff to show defects in the tax proceedings do not exist, *held*, that defendant's title is valid, and that the deed under which he claims vested a complete title in him, and that the deed under which the plaintiff claims conveyed nothing. *Murray v. Lamson*, 125.
  9. Whether a bill of particulars in a criminal case is permissible in this state, not decided, but, conceding it to be, it is always within the discretion of the trial court, which discretion will be interfered with only for abuse. *State v. Empting*, 128.
  10. The allowance of answers to leading questions which assume facts not proven is strictly discretionary with trial judge; and unless there appears a

**APPEAL AND ERROR—continued.**

- clear abuse of that discretion, appellate courts will not disturb their rulings. *State v. Empting*, 128.
11. Whether a verdict in a criminal case is against the evidence or not will not be reviewed on appeal, unless the motion for a new trial specifies as error that the verdict is against the evidence, and failure by the state to object to the motion for a new trial, when made without any specification, is not a waiver of the right to raise the question in this court. *State v. Empting*, 128.
12. Objections to questions and motions to strike out answers considered, and the rulings of the trial court sustained. *State v. Empting*, 128.
13. The rule on cross-examination of witnesses in criminal cases is that a wide latitude is permitted as to the motives and feelings of such witnesses towards defendants, and it is prejudicial error to refuse to permit any cross-examination on those matters. *State v. Hakon*, 133.
14. It is error to admit proof of acts and declarations of third persons, not in the presence of the defendant, unless a conspiracy has been shown between the persons making such declarations, or doing such acts, and the defendants, and that such acts or declarations were made or done in furtherance of the objects of the conspiracy. *State v. Hakon*, 133.
15. Where the information simply charges malicious and felonious administering of poisons to domestic animals, it is error, in view of the provisions of the statute, to show the poisoning of such animals by exposing poison with intent that it shall be taken by them. *State v. Hakon*, 133.
16. In a criminal case before the supreme court, only on errors as to portions of the charge, where no evidence is brought into the record, the instructions complained of will only be considered as to whether they are abstractly erroneous, or wrong under any view of the case. *State v. Peltier*, 188.
17. Instructions in such cases are presumed to be correct if the record leaves any room for presumption. *State v. Peltier*, 188.
18. An instruction in a criminal case which advises the jury of reasons for inflicting the death penalty, is erroneous as an invasion of the rights of the accused to have the question of his life or death passed upon solely by the jury, and this is emphatically so when no reasons are given for imprisonment. *State v. Peltier*, 188.
19. The jury is the sole judge as to the considerations in deciding between the penalty of death or life imprisonment, and the court's attempt to control its discretion is reversible error; and certain instructions set forth in the opinion infringe the defendant's rights to have the jury, uninfluenced, pass upon the penalty. *State v. Peltier*, 188.
20. The respondents herein applied to this court for a writ of certiorari in this action. Counsel in opposition to such application made certain state-

## APPEAL AND ERROR—continued.

- ments and admissions as to the nature and effect of an application theretofore made to the district court by respondents herein. Such statements and admissions were acceded to on the hearing by the applicants for such writ. The opinion of the court found in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, was predicated largely upon such statements and admissions. *Held*, that on an appeal from an order made in said action, counsel cannot be heard to question the correctness of the action of the court in relying upon the statements and admissions so made on the application for the writ of certiorari. *Williams v. Fairmount School Dist.* 198.
21. The dismissal, on stipulation, of an appeal from an order of the district court, is not an adjudication precluding application to the district court for an order granting other and different relief from that denied by the order formerly appealed from. *Williams v. Fairmount School Dist.* 198.
22. Under the facts disclosed on the record in this case and referred to in the opinion, *held*, that the moving party was not guilty of laches in making the application for the order appealed from herein. *Williams v. Fairmount School Dist.* 198.
23. Where, at the time testimony was stricken out, the court fully cautioned the jury to disregard the same, an omission to again instruct the jury to disregard such testimony is not error,—especially when no request is made for such an instruction. *State v. Tracy*, 205.
24. On an appeal from an order vacating a default judgment, granted on such an application, only the order, with the moving papers on which the same is based, will be considered by this court. Testimony taken subsequent to the ruling appealed from cannot be considered with the moving papers on such an appeal. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
25. The ruling of the trial court on a motion to vacate a default judgment, made under § 6884, will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court by said statute. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
26. An appeal from a judgment alone is ineffectual to bring up for review an order made subsequent to judgment, denying a new trial. *Paulsen v. M. W. of A.* 235.
27. In February, 1907, plaintiff duly perfected an appeal to the district court from a judgment of the county court. At the time the party appealing had an election to appeal either to the supreme or district court. In March following, chapter 68 of the Session Laws of 1907 took effect, and by its provisions such appeals are restricted to the supreme court. *Held*, that such amendatory statute does not operate to oust the district court of jurisdiction acquired by it over appeals previously taken and perfected. *Jenson v. Frazer*, 267.



## APPEAL AND ERROR—continued.

28. Under the statute in force at the time such appeal was perfected, appeals from the county to the district court were authorized to be taken in the same manner as appeals from justice courts. It is accordingly *held*, that plaintiff had a right to appeal to the district court for trial *de novo* or on questions of law alone. *Jenson v. Frazer*, 267.
29. The remedy of a party aggrieved by a decree of divorce, if the evidence is insufficient to sustain such decree, is not ordinarily a motion to vacate, but by appeal. *Wiemer v. Wiemer*, 371.
30. While foreclosing his mortgage in an appropriate action, plaintiff has the right to maintain an action to quiet title based upon his quitclaim deed, and it is error for the trial court to force him to elect between the two actions. *May v. Cummings*, 287.
31. This error cannot be taken advantage of by the defendants, upon whose motion the plaintiff was forced to elect. *May v. Cummings*, 287.
32. The Code regulating appeals from justice courts requires appellant to furnish appeal bond with sufficient surety, to be approved and filed with the clerk of the district court. Appellant took such appeal and filed the undertaking; the clerk failed to indorse the filing and his approval thereof, but filed the undertaking, and notified the justice to transmit the record to the district court, as required by § 8507, R. C. 1905. *Held*, that such notice, which could only be given upon the approval of the undertaking, presumes such approval, notwithstanding the failure to indorse the same. *Schulz v. Dahl*, 302.
33. Where mortgaged wheat is sold to an elevator company, and no act of conversion is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand and refusal. *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608; *Citizens Nat'l Bank v. Elev. Co.* 335.
34. Where no specification of error is incorporated in the statement on appeal, the statement will be disregarded. *Patrick v. Nurnberg*, 377.
35. Where no motion for new trial was made, and no specification of error incorporated in the settled statement of the case, this court disregards the statement settled, and will not review the evidence or rulings thereon during the trial, and reviews only the errors apparent from the judgment roll. *Patrick v. Nurnberg*, 377.
36. Where, at the close of the testimony as to certain issues in the case, the court might have directed a verdict or findings, any error not affecting the result as to such matters, uncontroverted by the evidence, or any issues to be found by the jury, is error without prejudice, and not ground for new trial. *Hart v. Wyndmere*, 383.
37. Where in drawing a jury in a civil action, some jurors called are absent,

## APPEAL AND ERROR—continued.

- it is no error to excuse them and draw others in their places. The trial judge has wide discretion in such matters. *State v. Banik*, 417.
38. Under the facts in this case, *held*, not error for the court to fail to admonish the jury with reference to certain statements made by the counsel for the state in his address to the jury. *State v. Banik*, 417.
39. Defendant asked the following instruction: "I charge you that, in the general course of nature and under the evidence in this case, the period of gestation is from 249 to 285 days, and unless you find that the defendant had sexual intercourse with the complainant within such period, your verdict must be for the defendant." *Held*, refusal not error, the proof showing a wider period of gestation than stated in the request, and the court having instructed on the same matter. *State v. Banik*, 417.
40. After this court has acquired jurisdiction of a cause by appeal, it has inherent power, on proper application, to enter any appropriate order therein, including the power to vacate a stay of execution pending the determination of such appeal ordered by the trial court upon an inappropriate or insufficient undertaking, unless appellant furnishes the necessary undertaking to secure the stay of execution granted. *Schafer v. District Court*, 476.
41. Plaintiff was divorced from defendant for extreme cruelty, and the custody of four small children was given to her, and permanent provision made to her from defendant's property. The supreme court granted plaintiff, after an appeal from the decree, a maintenance for herself and children pending the appeal, and entered an order for payment at stated intervals. Except to a small extent, defendant failed to comply with the order, and upon order to show cause he failed to purge himself of the contempt. The appeal and order to show cause were argued together. *Held*, the supreme court will not refuse his appeal from that part of the decree relating to permanent maintenance for the wife and children. *Tuttle v. Tuttle*, 503.
42. An appellate tribunal cannot go outside of the record as settled by the lower court, and be guided by statements of counsel in his brief, which have not been incorporated into and made a part of the record by such lower court. *State ex rel. Johnson v. Clark*, 517.
43. An order granting a new trial will not be disturbed on appeal where the record discloses any tenable ground in support of such order. *Citizens' Bank v. Schultz*, 551.
44. When errors are not assigned in appellant's brief, as required by rule 14, and no reason is disclosed why such rule should be relaxed, this court will not consider the appeal. *Frost v. Hoellinger*, 560.
45. Where trial is had and judgment entered on findings sufficient to sustain such judgment, this court will not on appeal review the sufficiency of

**APPEAL AND ERROR**—continued.

the pleadings unchallenged in the court below, when such defects could have been remedied by amendment, had suitable objection been made at the trial. *Ditton v. Purcell*, 648.

**APPEARANCE.** See Practice, 348.

**ARRAIGNMENT.** See Criminal Law, 161.

**ASSESSMENT.** See Drains, 1; Municipal Corporations, 140.

1. The general principle that land benefited by a drain equally with other land that is assessed for such benefits shall not be arbitrarily omitted from such assessment is not applicable where land in foreign territory is not and cannot be assessed for benefits incident to the construction of the drain in the drainage district that is assessed. *Freeman v. Trimble*, 1.
2. A real-estate owner whose property is about to be assessed to pay for a sewer, in an amount in excess of the sum justly due for that improvement, under a contract between the city and the contractor, may restrain the officers of the city from levying such assessment against his property. *Baker v. Lamoure*, 140.
3. Under §§ 2787 and 2800, R. C. 1905, the certificate of the city engineer that the work has been completed in accordance with the contract is essential before the city officers can properly levy assessments against individual property for the payment of the cost of a sewer. *Baker v. Lamoure*, 140.

**ASSIGNMENT.** See Mortgage, 531; Vendor and Purchaser, 509.

**ATTACHMENT.**

1. A justice of the peace acquires no jurisdiction to issue a writ of attachment until the summons in the action is issued, as attachment is a provisional or dependent remedy which has no existence until the commencement of an action. *Taugher v. N. P. Ry. Co.* 111.
2. When goods in transit are taken from the carrier by an officer under a writ of attachment against a third party, it is incumbent on the carrier, in an action for conversion, to give immediate notice to the shipper; and on failing to give such notice so as to enable the shipper to protect himself, the carrier assumes the burden of establishing the legality of the proceedings on which the attachment was made, and the fact that the writ was regular on its face does not protect the carrier if such writ was in law void. *Taugher v. N. P. Ry. Co.* 111.
3. When delivery by a carrier to an officer, under a valid writ of attachment,

**ATTACHMENT**—continued.

constitutes conversion, proof of the value of the property delivered as of the date delivered to the officer is competent proof of value to support a recovery. *Taughner v. N. P. Ry. Co.* 111.

4. A justice's summons bore date two days after the date of filing, with the justice, of the complaint, affidavit, and undertaking for attachment, and issuance of the writ of attachment, *held*, that on the offer of such papers in evidence, in an attempt to show that they were simultaneously issued, it was not error to exclude them from evidence. *Taughner v. N. P. Ry. Co.* 111.
5. In motions for dissolution of an attachment, the facts stated in the original affidavit being denied, the burden is on plaintiff to support the allegations thus made; failing to do this, the attachment should be dissolved. *Weil v. Quam*, 344.
6. While it is not necessary to use the exact language of the statute in the affidavit, yet the facts must be sufficiently stated, from which a conclusion "in language of the statute" would necessarily be drawn. *Weil v. Quam*, 344.
7. Where the attachment is sought under subparagraph 8 of § 6938, the property must be described specifically. It is not enough to tell where the goods are, but definite allegations must be made showing what they are. *Weil v. Quam*, 344.
8. What the statute requires to be stated in the affidavit must be truly stated therein. Plaintiff cannot supplement a defective affidavit by facts stated in the complaint, unless it is verified and made a part of the affidavit. *Weil v. Quam*, 344.

**ATTORNEY AT LAW.** See Evidence, 591.

1. *Held*, That the findings of the trial court in favor of the accused on certain charges are sustained by a preponderance of the evidence, but the charge that he has been guilty of disrespect to the court in connection with proceedings in a certain transaction set out in the evidence is not supported by any evidence regarding that transaction. *In re Maloney*, 157.
2. *Held*, further, that the charge of attempting to deceive the court in violation of his duty as an attorney is not sustained by that degree of clearness which justifies the court in suspending an attorney; particularly in view of the accused's explanation of the transaction and the absence of evidence in direct conflict with his version. *In re Maloney*, 157.

**ATTORNEY GENERAL.**

The attorney general can file a criminal information in the district court

**ATTORNEY GENERAL**—continued.

without showing reasons therefor, or why the state's attorney does not so act. *State v. White*, 444.

**BANKRUPTCY.**

1. A refusal of a discharge in bankruptcy is *res judicata* as to the right to discharge as to all claims scheduled and provable against the estate of the bankrupt. But where, several years later, second proceedings in bankruptcy are instituted by such bankrupt, and such claims are therein scheduled, it is the duty of the creditor who desires to rely on such former adjudication to plead the same, or otherwise call it to the attention of the bankruptcy court; and if he fails to do so, and a general discharge is granted in the second proceedings, the state court must give effect thereto in any proceeding thereafter brought to enforce the payment of such claim. *Youngman v. Salvage*, 317.
2. A single woman mortgaged land held by homestead filing on which she resided, to secure her father's debt to defendant, which mortgage was recorded. She later married her coplaintiff; they lived together on the land, and claimed homestead thereon under the state laws. The wife, mortgagor, scheduled in bankruptcy the debt, mortgage, and all its covenants, of which defendant had notice. Plaintiff was discharged in bankruptcy of all provable debts so dischargeable. In such proceedings the land was set out to her under the state homestead laws as exempt. She later proved up the homestead on five years' proof, which was patented to her. She and her husband ask in this suit that the mortgage be adjudged invalid, alleging its invalidity, that the homestead exemption defeated the mortgage, and the discharge in bankruptcy discharged the debt and mortgage. *Held*, that the mortgage is a valid lien on the land. *Adam v. McClintock*, 483.
3. As plaintiff, mortgagor, had resided six and a half years on the tract, prior to the institution of bankruptcy proceedings, she had the full, vested, equitable title to the land homesteaded, to which the mortgage attached before bankruptcy. *Adam v. McClintock*, 483.
4. The bankruptcy proceedings in no wise affected the lien of the mortgage. *Adam v. McClintock*, 483.
5. After filing the contract, plaintiff commenced an action in claim and delivery against the defendant, and the sheriff took the goods into his possession. The defendant rebonded and retained the goods. Three days later L. & K. filed a petition in bankruptcy, and their trustee took the said goods from this defendant in an action in the United States court, but without making this plaintiff a party. *Held*, that the said property was in the lawful custody of the state court, and that the defendant

**BANKRUPTCY—continued.**

could not plead the action of the trustee as a defense in the action in the state court. *Rock Island Plow Co. v. Western Imp. Co.* 608.

**BASTARDS.** See Evidence, 569; Instructions, 417.

1. Chapter 5 of the Code of Criminal Procedure of the year 1895, commonly known as the bastardy act, does not violate § 61 of our state Constitution. Said act is quasi criminal in its procedure, and is germane to the title of said Code. *State v. Brandner*, 310.
2. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, R. C. 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proof were properly refused. Instructions given, examined and found correct. *State v. Brandner*, 310.
3. Trial courts have wide discretion as to leading questions. The complainant was eighteen years old, without education, and testified through an interpreter. She was being examined about acts of illicit intercourse and the birth of a bastard child, born to her three weeks prior to the trial. Under those circumstances leading questions by the state were properly allowed. *State v. Brandner*, 310.
4. In bastardy proceedings, where jurors on *voir dire* state that the complaint upon which the proceedings are founded might influence their minds if introduced in evidence, it is no error to overrule a challenge when the juror swears that he can and will try the case upon the evidence presented and the law as given by the court. *State v. Banik*, 417.
5. In bastardy proceedings, where the question of the premature birth of the children is involved, it is not error to ask the mother to state generally the length of the child at the time of birth, and to use her answers as basis for hypothetical questions propounded to a physician in order to elicit his opinion as to whether the children were in fact prematurely born. *State v. Banik*, 417.
6. Evidence examined, and *held* sufficient to justify the verdict. *State v. Banik*, 417.

**BILL OF PARTICULARS.**

Whether a bill of particulars in a criminal case is permissible in this state, not decided, but, conceding it to be, it is always within the discretion of the trial court, which discretion will be interfered with only for abuse. *State v. Empting*, 128.

**BILLS AND NOTES.** See Appeal and Error, 302.

1. Following *Bank v. Flath*, 10 N. D. 81, 86 N. W. 867, *held* that plaintiff, a purchaser in due course, etc., of a negotiable note must show himself such, when the defendant pleads and shows that the note was obtained by the payee through fraud, or negotiated in breach of faith, and it is sufficient that plaintiff shows a purchase for value and before maturity; and, further, that good faith does not require the purchaser to inquire as to the purpose for which the note was given, or as to possible defenses, and bad faith is only imputed from knowledge or notice of fraud or defense, and mere knowledge or notice of suspicious circumstances will not defeat recovery. *Held*, further, this rule has not been relaxed by the negotiable instrument law. *Am. Nat'l Bank v. Lundy*, 167.
2. To defeat recovery on a negotiable note, purchased before maturity, for fraud in the inception of the note or negotiation in breach of faith, the indorsee's actual knowledge of the infirmity or defect, or knowledge of facts amounting to bad faith, must be shown. *Am. Nat'l Bank v. Lundy*, 167.
3. Sec. 6702, R. C. 1905, provides that constructive notice is notice imputed by the law to a person not having actual notice, and § 6703, R. C. 1905, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instrument law has no application to actions upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by § 6358, which defines notice in such case as actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith. *Am. Nat'l Bank v. Lundy*, 167.
4. In an action by an indorsee before maturity on a negotiable promissory note, proof that others than the defendants had given notes for a similar consideration, which were in the plaintiff bank for collection, which bank had been informed by the makers that they suspected fraud in such notes, who thereafter informed the bank that matters were satisfactory and paid the notes, is inadmissible. *Am. Nat'l Bank v. Lundy*, 167.
5. Knowledge of a contract by the parties to a negotiable note, a part of the same transaction, is insufficient to charge an indorsee for value, etc., with bad faith, without showing his knowledge of a breach of such contract. *Am. Nat'l Bank v. Lundy*, 167.
6. Certain testimony *held* erroneously received in the absence of proof connecting appellant with knowledge of a general scheme on the part of the original payee of the notes to defraud parties who gave them. *Am. Nat'l Bank v. Lundy*, 167.

## BILLS AND NOTES—continued.

7. Minor questions on admissibility of evidence passed upon. *Am. Nat'l Bank v. Lundy*, 167.
8. In a suit on a promissory note, respondent answered that the only consideration on the note was stock of appellant corporation; that he was not a subscriber to its capital stock; that he had tendered back his shares, with notice of rescission, and demanded a return of the note. On demurrer that the answer stated no defence, *held*, under the provision of § 4198, R. C. 1905, the demurrer should have been sustained. *German Mercantile Co. v. Metz*, 230.
9. Plaintiff voluntarily, and with full knowledge that he owed nothing to defendant, executed and delivered to him his negotiable promissory note, which the latter sold and transferred to a bona fide purchaser for value and without notice of any defense. Plaintiff, being compelled to pay such note, brought this action to recover from defendant the amount thus paid. *Held*, that no cause of action exists. *Dickinson v. Carroll*, 271.

BOARD OF UNIVERSITY AND SCHOOL LANDS. See *School Lands*, 212.

BONA FIDE PURCHASER. See *Bills and Notes*, 167, 271.

In an action brought in the name of a nominal plaintiff, the use plaintiff cannot claim to be an innocent purchaser without notice under our recording acts. *Hanitch v. Beiseker*, 290.

## BROKERS.

1. Before a broker can recover for services as such, he must plead and sustain a contract of employment, express or implied. *Kane v. Sherman*, 249.
2. Evidence in this case does not show such a contract, and the trial court properly directed the jury to find for the defendant. *Kane v. Sherman*, 249.
3. The evidence examined, and *held* to show that the employment of the defendants by the plaintiff was under a contract authorizing them to act as factors for the plaintiff, and not as plaintiff's brokers. Hence defendants had the right to purchase grain in their own names, and ship same to plaintiff, retaining title in themselves as security for their advances to plaintiff. *Turner v. Crumpton*, 294.

BURDEN OF PROOF. See *Evidence*, 167, 235, 281, 344, 377.

## CASES CRITICIZED, MODIFIED, AND OVERRULED.

1. Certain language in the opinion in *State ex rel. Minehan v. Meyers*, 19 N. D.



## CASES CRITICIZED, MODIFIED AND OVERRULED—continued.

- 804, 124 N. W. 701, wherein it was held that a four weeks' publication of notice of the submission of a county division proposition is essential, was inadvertently used, and the same is disapproved. *State v. Miller*, 324.
2. Where a defendant appears specially to object to the jurisdiction of a justice of the peace, and thereafter moves for a change of venue, and, at the time fixed for trial by the justice, to whom the case was transferred, defends on the merits, he thereby makes a voluntary appearance, and waives the benefit of his special appearance and objections thereunder to the jurisdiction over his person. Since *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, § 5060, Comp. Laws 1887, has been amended by prescribing what shall constitute a voluntary appearance, and that case no longer controls. *Heard v. Holbrook*, 348.

## CERTIORARI. See School Lands, 212.

1. The respondents herein applied to this court for a writ of certiorari in this action. Counsel in opposition to such application made certain statements and admissions as to the nature and effect of an application theretofore made to the district court by respondents herein. Such statements and admissions were acceded to on the hearing by the applicants for such writ. The opinion of the court found in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, was predicated largely upon such statements and admissions. *Held*, that on an appeal from an order made in said action, counsel cannot be heard to question the correctness of the action of the court in relying upon the statements and admissions so made on the application for the writ of certiorari. *Williams v. Fairmount School Dist.* 198.
  2. Certiorari does not lie when there is an appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. *Schafer v. District Court*, 476.
  3. Under the statute of this state, § 7810, R. C. 1905, a writ of certiorari is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. *State v. Clark*, 517.
  4. Considering the necessities of the people affected by the orders in this proceeding, without deciding whether the matters could be determined by an action in the nature of quo warranto, it is not certain that the remedy would be speedy and adequate. In such cases the writ should be granted. *State v. Clark*, 517.
- 21 N. D.—43.

**CHATTEL MORTGAGES.** See Account, 359; Verdict, 335; Wills, 359.

1. In the absence of other existing liens on property, a mortgagor may legally surrender the mortgaged property to the mortgagee, and authorize its sale and the application of the proceeds to the mortgage debt, though no default has occurred in the terms of the mortgage. *Taughner v. N. P. Ry. Co.* 111.
2. A chattel mortgage, in this state, conveys no title, but is only a lien on the property mortgaged; hence the purchaser of such property takes it subject to the lien of the mortgage, and there is no conversion until he does some affirmative act, like a tortious detention of the property from one entitled to its possession under the mortgage, or the exclusion or defiance of such party's right, or the withholding of possession under claim inconsistent with the mortgagee's title. *Citizens Nat'l Bank v. Elev. Co.* 335.
3. Where mortgaged wheat is sold to an elevator company, and no act of conversion is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand and refusal. *Towne v. St. Anthony & D. El. Co.* 8 N. D. 200, 77 N. W. 608. *Citizens' Nat's Bank v. El. Co.* 335.
4. Evidence of the existence of a mortgage given prior to the mortgage held by the plaintiff, on wheat in controversy, without showing a default in the terms thereof, or a demand for payment of a debt secured thereby, and for possession of the security, or that the plaintiff's subsequent mortgagee had notice or knowledge of its existence, is incompetent. *Citizens Nat'l Bank v. Elev. Co.* 335.
5. In an action by a second mortgagee of wheat, against an elevator company for converting such wheat, proof of a prior mortgage thereon, duly filed, and unpaid, does not constitute a defense, but when properly brought before the court may be shown in mitigation of damages to the extent of the amount due on and secured by the prior mortgage. *Citizens Nat'l Bank v. Elev. Co.* 335.

**CITIES.** See Municipal Corporations, 34, 140, 517.

**CITY AUDITOR.** See Evidence, 70; Municipal Corporations, 426.

**CITY ENGINEER.** See Municipal Corporations, 140.

**CLAIM AND DELIVERY.**

1. The parties to this action agreed that the value of the crop involved was

## CLAIM AND DELIVERY—continued.

- \$2,500. The contract under which the defendant held reserved the title to all such crop in the plaintiff, and the defendant agreed therein not to sell or remove any of such crop until a division thereof, without written consent of the plaintiff, and not until all of his covenants and agreements contained in the lease should be fulfilled; and that the plaintiff should have the right to take and hold enough of such crop that would, on a division of the same, belong to the defendant, to repay any and all advances made to him. The evidence shows that the defendant was disposing of the crop without having fulfilled the terms of the contract, and that he asserted title thereto superior and adverse to that of the plaintiff. In a replevin action a verdict was returned to the effect that the defendant's interest in the crop was \$700, and against the plaintiff. *Held*, that a verdict in favor of the plaintiff should have been directed. *Wadsworth v. Owens*, 255.
2. In claim and delivery, defendants, with sureties, executed a redelivery bond under § 6922, R. C. 1905, "for the delivery of the said property to the plaintiff if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action." Plaintiff recovered a mere money judgment only. In an action against the sureties on the bond the only breach alleged being the nonpayment of such judgment, *held*, the complaint fails to state a cause of action. *Larson v. Hanson*, 411.
  3. The obligation of the sureties for the payment "of such sum as may, for any cause, be recovered against the defendants," is not absolute, but conditional merely. Their obligation will be construed in the light of § 7075, R. C. 1905, which requires that a judgment in plaintiff's favor shall be in the alternative "for the possession or for the recovery of the possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof." *Larson v. Hanson*, 411.
  4. In claim and delivery, judgment for the value of the property and damages may be rendered where the property has been destroyed or lost and cannot be returned. In such case, with no proof to the contrary, it will be presumed, as against the defendant, that the property has been destroyed or lost and cannot be returned, but there is no such presumption against the sureties on the bond; as against them such exceptional facts warranting a money judgment must be alleged and proved in a suit on the bond. *Larson v. Hanson*, 411.
  5. After filing the said contract, plaintiff commenced an action in claim and delivery against the defendant, and the sheriff took the goods into his possession. The defendant rebonded and retained the goods. Three days later L. & K. filed a petition in bankruptcy, and their trustee took the

**CLAIM AND DELIVERY**—continued.

said goods from this defendant in an action in the United States court, but without making this plaintiff a party. *Held*, that the said property was in the lawful custody of the state courts, and that the defendant could not plead the action of the trustee as a defense in the action in the state court. *Rock Island Plow Co. v. Western Imp. Co.* 608.

**CLERK OF COURT.** See *Appeal and Error*, 302.

**COLLUSION.** See *Divorce*, 371, 503.

**COMMISSION SYSTEM OF GOVERNMENT.** See *Municipal Corporations*, 426.

**COMMITTING MAGISTRATE.** See *Preliminary Examination*, 161.

**COMMON CARRIERS.**

1. The relation of carrier and passenger may exist while the passenger is entering the car or vehicle, and before he is seated therein. The fact that no ticket has been purchased does not necessarily prevent such relation arising. An implied acceptance may arise without the purchase of a ticket or other acceptance in express terms. *Messenger v. Valley City S. & O. Ry. Co.* 82.
2. It is the duty of a common carrier to provide reasonably safe approaches to its cars, and to provide such approaches with lights at night. *Messenger v. Valley City S. & I. Ry. Co.* 82.
3. The question of defendant's negligence and plaintiff's contributory negligence is generally for the jury, and, when passed upon by it, will not ordinarily be disturbed. *Messenger v. Valley City S. & I. Ry. Co.* 82.
4. In an action for damages for conversion of grain by a common carrier, intrusted to it for transportation, one of the defenses relied upon by appellant was that the grain did not belong to the plaintiff consignor, but was the property of one C. In attempting to make proof of such ownership after proper foundation laid, and after C had testified that the grain all belonged to plaintiff, C was interrogated as to whether he had made statements to the effect that he owned the grain. *Held*, that such questions were proper as going to the credibility of C as a witness, when offered for that purpose, and that it was reversible error for the trial court to sustain objections to such questions. *Taugher v. N. P. Ry. Co.* 111.

**COMMON CARRIERS—continued.**

5. On proof of delivery of property to a common carrier in sound condition, and of its failure to redeliver it; a sufficient case is made to sustain a recovery for loss in an action by the shipper on his contract, with certain exceptions, which have no application in this case; but other and different proof may be necessary in such case to sustain an action for conversion against the carrier. *Taughner v. N. P. Ry. Co.* 111.
6. If a shipper elects to sue for conversion, and fails to establish the elements necessary to constitute conversion, his action must fail, unless his complaint states facts necessary to sustain a recovery on the contract or some other proper form of recovery, as the burden is on the shipper, when he seeks the benefit of the measure of damages for conversion to prove the act of conversion. *Taughner v. N. P. Ry. Co.* 111.
7. While proof of a demand and refusal to deliver the property or thing may establish conversion in connection with other facts, the demand and refusal are only evidence of conversion when the defendant was in such condition that it might have delivered the property if it would, and conversion does not lie against a common carrier for mere nonfeasance, nor for goods stolen from the carrier, nor for negligence causing the loss, nor for bare omission. *Taughner v. N. P. Ry. Co.* 111.
8. When goods in transit are taken from the carrier by an officer under a writ of attachment against a third party, it is incumbent on the carrier, in an action for conversion, to give immediate notice to the shipper; and on failing to give such notice, so as to enable the shipper to protect himself, the carrier assumes the burden of establishing the legality of the proceedings on which the attachment was made; and the fact that the writ was regular on its face does not protect the carrier if such writ was in law void. *Taughner v. N. P. Ry. Co.* 111.
9. When delivery by a carrier to an officer, under a valid writ of attachment, constitutes conversion, proof of the value of the property delivered, as of the date delivered to the officer, is competent proof of value to support a recovery. *Taughner v. N. P. Ry. Co.* 111.

**COMPLAINT.** See Attachment, 344.

**CONDEMNATION PROCEEDINGS.** See Eminent Domain, 232.

**CONSPIRACY.** See Evidence, 133.

**CONSTITUTIONAL LAW.** See Indictment and Information, 179;  
Legislature, 64.

1. In the trial of a contempt proceeding for violation of an injunction against

## CONSTITUTIONAL LAW—continued.

- a liquor nuisance, the state, over objection, introduced a purported copy of a United States stamp for special tax, certified to by the city auditor. *Held*, error, as chapter 189, Laws 1897, under which a copy of such special tax stamp was filed with said officer being unconstitutional, the copy was incompetent evidence for any purpose. *State v. Winbauer*, 70.
2. Sec. 764, R. C. 1905, which prescribes that at each general election there shall be elected in each county a superintendent of schools, whose term shall be two years "and until his successor is elected and qualified," is a constitutional and valid enactment. *Jenness v. Clark*, 150.
  3. Sec. 35, chap. 80, Laws 1909, providing "no preliminary examination shall be necessary before trial in criminal actions in the county court," is not unconstitutional. *State v. Gottlieb*, 179.
  4. The state's attorney filed his information in the county court, and an affidavit in the form of a criminal complaint, setting forth all the facts alleged in the information. *Held*, that this was a sufficient compliance with § 18 of the Constitution. *State v. Gottlieb*, 179.
  5. Sec. 156 of the Constitution, providing for the Board of University and School Lands, construed with the statutory enactment for its execution, gives said board full power in the sale of school lands, except as otherwise limited by constitutional and statutory enactment. *Fuller v. Board of University and School Lands*, 212.
  6. Qualified electors, as defined by § 121 of the Constitution, are male persons only, possessing the other qualifications therein enumerated. *Wagar v. Prindeville*, 245.
  7. Women, entitled to vote for school officers under the provisions of § 128 of the Constitution, constitute a class separate from electors, as above defined, and only possess a limited elective franchise. *Wagar v. Prindeville*, 245.
  8. Chapter 5 of the Code of Criminal Procedure of the year 1895, commonly known as the bastardy act, does not violate § 61 of our state Constitution. Said act is quasi criminal in its procedure, and is germane to the title of said Code. *State v. Brandner*, 310.
  9. Sec. 79, Constitution of North Dakota, provides: "If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislative assembly, by its adjournment, prevent its return, in which case it shall be a law unless he shall file the same, with his objections, in the office of the secretary of state, within fifteen days after such adjournment." *Held*, construing said constitutional provision, that in computing the fifteen days' period in which the governor may exercise the veto power after the adjournment of the legislative assembly, Sundays are not excepted; consequently the attempted veto of house bill No. 410, relating to abstract-

**CONSTITUTIONAL LAW**—continued.

ers of titles, passed by the twelfth legislative assembly on March 3d, became a law on March 18th, and the attempted exercise by the governor of his veto power as to such bill, on March 21st, is of no force or effect. *State v. Norton*, 473.

**CONTEMPT.** See Costs, 70; Divorce, 503.

1. In the trial of a contempt proceeding for violation of an injunction against a liquor nuisance, the state, over objection, introduced a purported copy of a United States stamp for special tax, certified to by the city auditor. *Held*, error, as chapter 189, Laws 1897, under which a copy of such special tax stamp was filed with said officer being unconstitutional, the copy was incompetent evidence for any purpose. *State v. Winbauer*, 70.
2. The admission of such exhibits, while error, was nonprejudicial, as defendant's guilt was established by the direct, positive, and wholly uncontradicted testimony of three witnesses who were in no way impeached or discredited. *State v. Winbauer*, 70.

**CONTINUANCE.** See Discretion, 235.**CONTRACT.** See Bills and Notes, 167; Brokers, 249, 294; Common Carriers, 82; Drains, 1; Factors, 294; Insurance, 447; Landlord and Tenant, 255; Municipal Corporations, 140; Payment, 383; Principal and Surety, 411; Sales, 478, 575. Vendor and Purchaser, 101, 509.

1. Plaintiff contracted with defendant, for a salary of \$1,800 per year and one half the net profits, to manage defendant's business of printing, publishing, and circulating of newspapers, in Fargo; contract to continue six years. When this contract was made plaintiff resided at Langdon, North Dakota, practising law; his business netting him \$2,500 per year. After making this contract, plaintiff abandoned his law business, moved his family to Fargo, where his duties under the contract were to be performed, entered upon such duties, faithfully performed them for nearly three months, when, it is alleged, defendant wrongfully and without cause discharged him. In an action for damages for such discharge, plaintiff offered proofs of his reasonable expenses in so removing, the worth of his services, and as tending to prove the latter fact, offered to show his earning capacity at Langdon when he made the contract, which offer was rejected. *Held*, error, for reasons stated in the opinion. The prospective profits being too uncertain and conjectural for approximate measurement, the rule for measuring plaintiff's damages is that he may recover the

## CONTRACT—continued.

- amount expended on the face of the contract, including allowance for his time and services. *McLean v. News Pub. Co.* 89.
2. It does not lie in the mouth of the party who has voluntarily and wrongfully put an end to a contract of employment, to say that the party injured has not been damaged, at least, to the amount of what he has been induced fairly and in good faith to lay out and expend, including his services. He is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred. *McLean v. News Pub. Co.* 89.
  3. On proof of delivery of property to a common carrier in sound condition, and of its failure to redeliver it, a sufficient case is made to sustain and recover for loss in an action by the shipper on his contract, with certain exceptions, which have no application in this case; but other and different proof may be necessary in such case to sustain an action for conversion against the carrier. *Taughner v. N. P. Ry. Co.* 111.
  4. The gist of the action on the contract in such case is the failure to deliver, while the gist of an action in trover is the conversion, and the mere showing of a breach of contract may not prove conversion. *Taughner v. N. P. Ry. Co.* 111.
  5. If a shipper elects to sue for conversion, and fails to establish the elements necessary to constitute conversion, his action must fail unless his complaint states facts necessary to sustain a recovery on the contract or some other proper form of recovery, as the burden is on the shipper, when he seeks the benefit of the measure of damages for conversion, to prove the act of conversion. *Taughner v. N. P. Ry. Co.* 111.
  6. Where a city and a contractor enter into a contract for the construction of a sewer, and said contract specifies that the work must be done to the satisfaction of the city engineer, such provision is binding upon the city and the contractor, and the city will be restrained from levying assessments against individual property, where the city engineer, in good faith, refuses to approve of the contractor's work. *Baker v. La Moure*, 140.
  7. Appellant signed a subscription paper to erect a new church, which read: "In consideration of our mutual promise, we, the undersigned, promise and agree to pay to. . . . All subscriptions are due and payable, unless otherwise stipulated on this list, one half when the contract for the building is let, and one half when it is inclosed, and it is expressly understood that these subscriptions shall not be binding until at least \$6,000 is subscribed or provided for in aid of the work." *Held*, the subscriptions were binding when the \$6,000 were subscribed or provided for. *Thompkins v. Dinnie*, 305.
  8. Plaintiff offered to show that all conditions of the subscription paper were complied with by respondent. Appellant offered to prove a parol agree-



**CONTRACT—continued.**

ment with the pastor, who took the subscription, that it should not be binding unless such pastor continued with the church, and that he did not so continue and that appellant undertook to cancel his subscription when about \$3,000 were subscribed. *Held*, not error to exclude the offer, as appellant's counsel stated that he could not show that \$6,000 was not provided for when the cancelation was attempted. *Thompkins v. Dinnie*, 305.

9. It is contended on behalf of one of the defendants that she was, at the time of signing the notes and mortgages, of unsound mind and mentally incompetent to enter into a binding obligation. The evidence fails to show that she was "a person entirely without understanding," within the meaning of §§ 4018 and 4019, R. C. 1905, and it is accordingly held that such defense is not established. *Wood v. Pehrsson*, 357.

**CONTRIBUTORY NEGLIGENCE.** See Negligence, 34, 43, 82.

**CORPORATIONS.**

1. In a suit on a promissory note, respondent answered that the only consideration on the note was stock of appellant corporation; that he was not a subscriber to its capital stock; that he had tendered back his shares with notice of rescission, and demanded a return of the note. On demurrer that the answer stated no defense, *held*, under the provisions of § 4198, R. C. 1905, the demurrer should have been sustained. *German Mercantile Co. v. Metz*, 230.
2. Under the provisions of the Probate Code of this state it is held that a foreign corporation is incompetent to receive letters of administration upon the estate of a deceased person, and that therefore county courts have no authority to issue letters of administration to such foreign corporations. *Grunow v. Simonitsch*, 277.

**CORROBORATION.** See Divorce, 503.

**COSTS.** See Intoxicating Liquors, 444.

1. Payment of costs to the clerk, under an order, which are not accepted by the appellant, is no ground for the dismissal of the appeal. *State v. Bleth*, 27.
2. The costs and disbursements incurred in prosecuting contempt proceedings may be taxed against defendant found guilty. *State v. Winbauer*, 70.
3. Where the record fails to disclose what items of cost and disbursements were incurred, the supreme court will not review the taxation by the trial court. *State v. Winbauer*, 70.

COUNTERCLAIMS. See Adverse Claims, 125; Sales, 383.

COUNTIES. See Streets and Highways, 557; Taxation, 557.

1. All matters pertaining to a division of counties are purely legislative questions unless regulated by constitutional provisions. *Murray v. Davis*, 64.
2. On the question of the division of counties, as governed by §§ 2329, 2330, and 2331, R. C. 1905, the election under § 2329 does not confer a legal existence on the new or proposed county. *Murray v. Davis*, 64.
3. Under § 2330, a legal existence is not conferred upon such new county until after the governor has appointed commissioners, and they have accepted and qualified as such. *Murray v. Davis*, 64.
4. Until such county commissioners qualify, voters residing in a proposed new county are legal voters of the county about to be divided, and can legally vote on all matters pertaining to that county. *Murray v. Davis*, 64.
5. The supreme court, in the exercise of its original jurisdiction, will, under the facts alleged in the petition, and on the application of the attorney general in the name of the state, issue its prerogative writ to enjoin an alleged new county and those assuming to act as its officers from exercising jurisdiction over the territory embraced within such new county, until the district court, in which is pending a proceeding to determine the validity of the election at which the proposition was submitted for the organization of such county, has finally adjudicated such question. *State v. Miller*, 324.
6. The issue as to the validity of such election having been duly submitted to the courts for adjudication, it is a legal fraud upon the people who are interested in defeating the organization of such proposed new county, and who are consequently the real parties in interest, for the county auditor, a mere nominal party, to end such litigation in effect by the issuance of his certificate to the secretary of state, as provided by § 2330. R. C. 1905, his right to issue such certificate being dependent upon the validity of such election. *State v. Miller*, 324.
7. Certain language in the opinion in *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, wherein it was held that a four weeks' publication of notice of the submission of a county division proposition is essential, was inadvertently used, and the same is disapproved. *State v. Miller*, 324.

COUNTY AUDITOR. See Counties, 324.

COUNTY COMMISSIONER. See Counties, 64; Noxious Weeds, 462; Municipal Corporations, 517.

**COUNTY COURTS.** See Constitutional Law, 179; Executors and Administrators, 277.

1. The state's attorney filed in the county court an affidavit in the form of a criminal complaint, sworn to positively, showing violations by appellant of the prohibition law; at the same time he filed his information in due form verified on information and belief. A motion to quash such information was overruled. *Held*, not error for reasons stated in the opinion. *State v. Gottlieb*, 179.
2. The provisions of chap. 80, Laws 1909, authorizing the institution of criminal proceedings in the county court by the filing of informations by the state's attorney, should be construed in connection with § 18 of the Constitution, which provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation." *State v. Gottlieb*, 179.
3. In February, 1907, plaintiff duly perfected an appeal to the district court from a judgment of the county court. At the time the party appealing had an election to appeal either to the supreme or district court. In March following, chap. 68 of the Session Laws of 1907, took effect, and by its provisions such appeals are restricted to the supreme court. *Held*, that such amendatory statute does not operate to oust the district court of jurisdiction acquired by it over appeals previously taken and perfected. *Jenson v. Frazer*, 267.
2. Under the statute in force at the time such appeal was perfected, appeals from the county to the district court were authorized to be taken in the same manner as appeals from justice courts. It is accordingly *held*, that plaintiff had a right to appeal to the district court for trial *de novo*, or on questions of law alone. *Jenson v. Frazer*, 267.

**COUNTY SUPERINTENDENT.**

1. Sec. 764, R. C. 1905, which prescribes that at each general election there shall be elected in each county a superintendent of schools, whose term shall be two years "and until his successor is elected and qualified," is a constitutional and valid enactment. *Jenness v. Clark*, 150.
2. Following the rule announced in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, *held*, that under such statute the regularly elected incumbent of the office is entitled to hold the same until his successor is legally elected and qualified. *Jenness v. Clark*, 150.

**COURTS.** See County Courts, 267; Criminal Law, 188; Discretion, 261; Jurisdiction, 198, 608; Jury, 417; Practice, 470; School Lands, 212.

Courts have broad discretion as to amendments, especially where they would necessitate a continuance of the cause. *Paulson v. M. W. of A.* 235.

## COVENANTS.

1. The mortgagor by reason of the covenants and recitals contained in the mortgage is estopped to deny its validity. *Adam v. McClintock*, 482.
2. M. E. Wagner gave a warranty deed to defendant corporation, covenanting "that the same is free from all encumbrances except a mortgage given to McWilliams for \$400," with the other covenants of general warranty. The mortgagors, after said deed had been recorded, paid McWilliams the amount of the mortgage, and took an assignment thereof, which, with the mortgage note past due, they delivered to plaintiff, who had both actual and constructive notice of defendant's corporation rights under its deed. *Held*, that the grantee in the deed did not purchase the land subject to said mortgage, but under the covenant of general warranty in the deed the grantor's liability to pay the mortgage continued, and the law presumes that the assignment was taken as a fulfilment of their duty to defend the title by them conveyed, and the assignment operated as an immediate satisfaction of the mortgage, and that the plaintiff by the assignment from the Wagners did not obtain a lien by mortgage upon said premises, nor revive thereby the mortgage discharged by such payment. *Sommers v. Wagner*, 531.

## CRIMINAL LAW. See Jury, 569; Instructions, 72.

1. An instruction as to the corroboration of witnesses, which states that if any witness has "wilfully testified falsely," is sufficient, and it need not be stated that such testimony must be wilfully and intentionally false. *State v. Winney*, 72.
2. An instruction which states that if any witness has wilfully testified falsely, etc., the jury are at liberty to wholly disregard his testimony, "except so far as the same is corroborated by other credible testimony in the case," is not erroneous by reason of the use of the word "testimony" in place of the word "evidence," as these words means the same, as commonly understood. *State v. Winney*, 72.
3. An instruction in such case is not prejudicially erroneous in not further stating that corroboration may be given to the testimony of a witness by facts and circumstances occurring at the trial. *State v. Winney*, 72.
4. An information for keeping a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient. *State v. Bloomdale*, 77.
5. If the time and place of the former conviction and the court wherein it was had are definitely stated, it will be held a good allegation of a former conviction. *State v. Bloomdale*, 77.

## CRIMINAL LAW—continued.

6. On a trial for the crime of keeping and maintaining a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, the defendant is entitled to ten peremptory challenges to jurors. *State v. Bloomdale*, 77.
7. The allegations of the information considered, and *held*, sufficient as to a former conviction, as well as to the crime charged as of the present time. *State v. Bloomdale*, 77.
8. Whether a bill of particulars in a criminal case is permissible in this state, not decided, but, conceding it to be, it is always within the discretion of the trial court, which discretion will be interfered with only for abuse. *State v. Empting*, 128.
9. The allowance of answers to leading questions which assume facts not proven is strictly discretionary with trial judges, and unless there appears a clear abuse of that discretion, appellate courts will not disturb their rulings. *State v. Empting*, 128.
10. Whether a verdict in a criminal case is against the evidence or not will not be reviewed on appeal unless the motion for a new trial specifies as error that the verdict is against the evidence; and failure by the state to object to the motion for a new trial when made, without any specification, is not a waiver of the right to raise the question in this court. *State v. Empting*, 128.
11. It is discretionary with trial courts whether or not all witnesses shall be excluded from the court room during the trial. *State v. Hakon*, 133.
12. Where the information follows the language of the statute making it a crime to wilfully poison domestic animals, and it further designates the animal poisoned as a horse, and states the ownership thereof, no further description of the horse is necessary. *State v. Hakon*, 133.
13. Whether a motion to make an information more definite may ever be granted as a matter of right, not determined, but if permissible there was no abuse of discretion in denying such motion in this case. *State v. Hakon*, 133.
14. The rule on cross-examination of witnesses in criminal cases is that a wide latitude is permitted as to the motives and feelings of such witnesses towards defendants, and it is prejudicial error to refuse to permit any cross-examination on those matters. *State v. Hakon*, 133.
15. It is error to sustain an objection to a question on the cross-examination of a complaining witness, as to whether he had offered a bribe to a person if he would appear and testify as to certain matters against the defendants. *State v. Hakon*, 133.
16. It is not permissible to prove another and independent offense against the defendants on the ground that it shows a motive for the commission of the crime charged, unless such proof fairly and reasonably tends to show such motive. *State v. Hakon*, 133.

## CRIMINAL LAW—continued.

17. It is error to admit proof of acts and declarations of third persons not in the presence of the defendants, unless a conspiracy has been shown between the persons making such declarations or doing such acts and the defendants, and that such acts or declarations were made or done in furtherance of the object of the conspiracy. *State v. Hakon*, 133.
18. Where the information simply charges malicious and felonious administering of poisons to domestic animals, it is error, in view of the provisions of the statute, to show the poisoning of such animals by exposing poison with the intent that it shall be taken by them. •*State v. Hakon*, 133.
19. A preliminary examination, or a waiver thereof, is necessary to the filing of an information in the district court for a crime against the laws of the state, except such as are committed during a term of court, barring the special cases in § 9791, R. C. 1905. *State v. Winbauer*, 161.
20. Upon arraignment under an information charging an offense not committed during court, nor included in the exceptions contained in § 9791, R. C. 1905, the proper procedure is by motion to set aside the information. *State v. Winbauer*, 161.
21. On January 12, 1910, defendant waived a preliminary examination upon a charge of keeping and maintaining a nuisance in violation of the prohibition law, at times since July 1, 1909, in certain described premises, and was bound over. On May 5, 1910, information was filed at a term of the district court commencing May 3, 1910, charging defendant with the same offense, in the same premises, on July 1, 1909, and including May 2, 1910. *Held*, that the complaint and information charged two distinct offenses, and the 2d day of May, 1910, not falling within a term of the district court, the information should have been set aside, as defendant had neither had nor waived a preliminary examination as to the offense. *State v. Winbauer*, 161.
22. Sec. 35, chap. 80, Laws 1909, providing "no preliminary examination shall be necessary before trial in criminal actions in the county court," is not unconstitutional. *State v. Gottlieb*, 179.
23. The state's attorney filed in the county court an affidavit in the form of a criminal complaint, sworn to positively, showing violations by appellant of the prohibition law; at the same time he filed his information in due form, verified on information and belief. A motion to quash such information was overruled. *Held*, not error for reasons stated in the opinion. *State v. Gottlieb*, 179.
24. The provisions of chap. 80, Laws 1909, authorizing the institution of criminal proceedings in the county court by the filing of information by the state's attorney, should be construed in connection with § 18 of the Constitution, which provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation." *State v. Gottlieb*, 179.

## CRIMINAL LAW—continued.

25. The state's attorney filed his information in the county court, and an affidavit in the form of a criminal complaint, setting forth all the facts alleged in the information. *Held*, that this was a sufficient compliance with § 18 of the Constitution. *State v. Gottlieb*, 179.
26. In a prosecution for violations of the prohibition law a list of special taxpayers, certified by the internal revenue collector, including defendant's name, was received over objection. *Held*, error, for reasons stated in the opinion. *State v. Gottlieb*, 179.
27. In a criminal case before the supreme court only on errors as to portions of the charge, where no evidence is brought into the record, the instructions complained of will only be considered as to whether they are abstractly erroneous, or wrong under any view of the case. *State v. Peltier*, 188.
28. Instructions in such case are presumed to be correct, if the record leaves any room for presumption. *State v. Peltier*, 188.
29. Under § 9985, R. C. 1905, providing in criminal cases that the court must only charge as to the law of the case, and by § 10,026, R. C. 1905, making the jury exclusive judges of all questions of fact, the judge must express no opinion on the facts, nor weigh the evidence, nor give intimation as to the guilt of the accused. *State v. Peltier*, 188.
30. Under § 8805, R. C. 1905, on finding the accused guilty of murder in the first degree, the jury must designate in their verdict the punishment, either by death, or by imprisonment for life. *Held*, the only duty of the court is to inform the jury of the two modes of punishment, and it is left to that body to determine which. *State v. Peltier*, 188.
31. An instruction in a criminal case, which advises the jury of reasons for inflicting the death penalty, is erroneous as an invasion of the rights of the accused to have the question of his life or death passed upon solely by the jury, and this is emphatically so when no reasons are given for imprisonment. *State v. Peltier*, 188.
32. The jury is the sole judge as to the considerations in deciding between the penalty of death or life imprisonment, and the court's attempt to control its discretion is reversible error; and certain instructions set forth in the opinion infringe the defendant's rights to have the jury, uninfluenced, pass upon the penalty. *State v. Peltier*, 188.
33. Defendant's receipts for freight shipments are competent evidence as admissions against him. *State v. Tracy*, 205.
34. Court's caution to the jury during the trial *held* sufficient, in the absence of a request by defendant for more definite instructions. *State v. Tracy*, 205.
35. Where at the time testimony was stricken out the court fully cautioned the jury to disregard the same, an omission to again instruct the jury to dis-

## CRIMINAL LAW—continued.

- regard such testimony is not error,—especially when no request is made for such an instruction. *State v. Tracy*, 205.
36. Testimony examined, and *held* sufficient to warrant conviction for the crime charged. *State v. Tracy*, 205.
  37. The attorney general can file a criminal information in the district court without showing reasons therefor, or why the state's attorney does not so act. *State v. White*, 444.
  38. Filing an affidavit of prejudice against the presiding judge and the county does not divest the former of authority to transfer the case to another county for trial. *State v. White*, 444.
  39. An information for keeping and maintaining a nuisance, a saloon, need not describe with particularity the place of its commission. An information charging "a certain place located in the city of Bismarck, in said county and state," is sufficient when no abatement of nuisance is sought, or property lien for fine and costs. *State v. White*, 444.
  40. Counsel in argument must confine himself to the evidence, and not go beyond the limits of legitimate argument and comment thereon. *State v. Knudson*, 562.
  41. Where defendant alleges misconduct in the argument, and relies on the same for reversal, he must first seasonably object and obtain a ruling thereon, request the court to reprimand counsel and instruct the jury, or other suitable action; if the instructions given are insufficient he should in writing request additional ones. *State v. Knudson*, 562.
  42. The evidence examined, and *held*, that the statement of counsel was based on the evidence in the case. *State v. Knudson*, 562.
  43. New trials will not be had for denying challenge for cause, unless peremptory challenges are exhausted. *State v. Goetz*, 569.
  44. *Held*, that the court did not, in its instructions, misplace the burden of proof, and that defendant was not entitled to a new trial because of the nonappearance of a witness under subpoena. *State v. Goetz*, 569.
  45. Evidence examined, and *held* sufficient to sustain conviction for maintaining a common nuisance. *State v. Schumacher*, 591.
  46. Admissions of guilt, made by the defendant to the assistant state's attorney, to procure discontinuance of prosecution, are admissible under the evidence in this case, and are not privileged as communications between attorney and client. *State v. Schumacher*, 591.

CROSS-EXAMINATION. See Witnesses, 133.

DAMAGES. See Adverse Claims, 101; Eminent Domain, 232; Evidence, 335; Sales, 478; Trover and Conversion, 111.

1. In an action to recover damages resulting from prairie fires negligently



**DAMAGES**—continued.

- caused by defendant's servants, evidence examined and held insufficient to justify the verdict, the record presenting a case of total failure of proof as to the extent of the damages suffered. *Spicer v. N. P. Ry. Co.* 61.
2. Plaintiff contracted with defendant, for a salary of \$1,800 per year and one half the net profits, to manage defendant's business of printing, publishing, and circulating of newspapers in Fargo; contract to continue six years. When this contract was made, plaintiff resided at Langdon, North Dakota, practising law; his business netting him \$2,500 per year. After making this contract, plaintiff abandoned his law business, moved his family to Fargo, where his duties under the contract were to be performed, entered upon such duties, faithfully performed them for nearly three months, when, it is alleged, defendant wrongfully and without cause discharged him. In an action for damages for such discharge, plaintiff offered proofs of his reasonable expenses in so removing, the worth of his services, and, as tending to prove the latter fact, offered to show his earning capacity at Langdon when he made the contract, which offer was rejected. *Held*, error, for reasons stated in the opinion. The prospective profits being too uncertain and conjectural for approximate measurement, the rule for measuring plaintiff's damages is that he may recover the amount expended on the face of the contract, including allowance for his time and services. *McLean v. News Pub. Co.* 89.
3. It does not lie in the mouth of the party who has voluntarily and wrongfully put an end to a contract of employment to say that the party injured has not been damaged, at least, to the amount of what he has been induced, fairly and in good faith, to lay out and expend including his services. He is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred. *McLean v. News Pub. Co.* 89.
4. In an action to determine adverse claims to real estate under § 31, R. C. 1905, brought by the vendor on an executory contract for the sale of land, the plaintiff cannot recover both for the value of the crop raised after forfeiture of the contract by the vendee, and for the use and occupation of the land on which the crop was raised, after severance of such crop from the land. *Golden Valley L. & C. Co. v. Johnstone*, 101.
5. If, for any reason, the jury determines the amount of the benefits, the trial court should disregard such determination as surplusage, and order judgment for the amount of the full damages, if the amounts can be separated. *Heskin v. Herbrandson*, 232.
6. Sec. 2086, R. C. 1905, imposes no such duty upon a person to destroy noxious weeds upon the land he owns or occupies as will make him liable for damages for failure to destroy until after the county commissioners have prescribed the time and manner of destruction. As to whether action 21 N. D.—44.

**DAMAGES**—continued.

would lie after the commissioners acted, not determined. *Langer v. Goode*, 462.

**DEEDS.** See Adverse Claims, 125; Merger, 281; Practice, 290; Quieting Titles, 290.

**DEMAND.** See Trover and Conversion, 335.

**DEMURRER.** See Bills and Notes, 230.

1. In an action to determine adverse claims to real property, a demurrer to the complaint, stating as the only ground that several causes of action are improperly used, cannot be sustained when the facts constitute only one cause of action, although the demands for relief be inconsistent or applicable to different causes of action which could not be properly united. In determining a demurrer, the demands for relief are no part of the cause of action. *Golden Valley L. & C. Co. v. Johnstone*, 97.
2. On demurrer to the complaint solely for improper union of several causes of action, it is contended on appeal from an order overruling such demurrer, that the complaint does not state a cause of action, and the order overruling the demurrer should be reversed. *Held*, this question is not before the court. *Golden Valley L. & C. Co. v. Johnstone*, 97.

**DEPOSITION.**

1. A motion to suppress a deposition on the ground that the certificate thereto does not state that the deposition was reduced to writing, or name the person reducing it to typewriting, should be denied in the absence of some showing of prejudice in support of the motion. *Patrick v. Nurnberg*, 377.
2. A presumption in favor of regularity of taking depositions, and proper performance of duty by the officer taking same, applies in the absence of proof to the contrary; and the burden to rebut such presumption is upon the party seeking the deposition. *Patrick v. Nurnberg*, 377.
3. In the absence of proof it will be presumed the officer taking the deposition, or the witness testifying by deposition, reduced the same to writing, and the testimony may be examined to supplement the officer's certificate in such respect. *Patrick v. Nurnberg*, 377.

**DETECTIVES.** See Evidence, 70.

**DISBARMENT.** See Attorneys at Law, 157.

**DISCRETION.** See Criminal Law, 133; Practice, 133; School Lands, 212.

1. Large discretion is vested in drain commissioners in assessing benefits, and determining when outlets may be secured, and such discretion will not be interfered with, except in case of fraud or abuse of discretion. *Freeman et al. v. Trimble et al.* 1.
2. Whether a building in which a tenant of the owner has maintained a nuisance by keeping and selling intoxicating liquors therein, of which the owner had knowledge prior to the commencement of an action to abate the nuisance, shall be turned over to the owner, after it has been closed by proceedings under § 9373 R. C. 1905, is discretionary with the trial court, and such discretion will not be disturbed except in cases of the abuse thereof. *State v. Bleth*, 27.
3. Whether a bill of particulars in a criminal case is permissible in this state, not decided, but, conceding it to be, it is always within the discretion of the trial court, which discretion will be interfered with only for abuse. *State v. Empting*, 128.
4. The allowance of answers to leading questions which assume facts not proven is strictly discretionary with trial judges, and unless there appears a clear abuse of that discretion, appellate courts will not disturb their rulings. *State v. Empting*, 128.
5. Application to vacate a judgment in district court was made; said court had lost jurisdiction of the action by appeal; on the return of the record from the supreme court the application was renewed. *Held*, that the first determination did not preclude a new application on the same ground after jurisdiction had reverted in the district court, and the consideration of the second application, while the district court had jurisdiction, did not, under the circumstances of the case, constitute an abuse of discretion. *Williams v. Fairmount School Dist.* 198.
6. The ruling of the trial court on a motion to vacate a default judgment, made under said § 6884, will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court by said statute. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
7. The exercise of the court's discretion on such an application should tend, in a reasonable degree, to bring about a trial on the merits, when the circumstances are such as to lead the court to hesitate upon the motion to open the default. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
8. In an action on a benefit certificate, the sole issue was assured's suicide, which, under its terms, avoided the policy. After the case was called, defendant asked to amend its answer by alleging a new defense, based upon fraud and breach of warranty on the part of the assured in effecting the insurance. *Held*, an abuse of discretion to deny the motion. *Paulsen v. M. W. of A.* 235.

## DISCRETION—continued.

9. Courts have broad discretion as to amendments, especially where they would necessitate a continuance of the cause. *Paulson v. M. W. of A.* 235.
10. Trial courts have wide discretion as to leading questions. The complainant was eighteen years old, without education, and testified through an interpreter. She was being examined about acts of illicit intercourse and the birth of a bastard child, born to her three weeks prior to the trial. Under those circumstances leading questions by the state were properly allowed. *State v. Brandner*, 310.
11. Generally mandamus does not lie to control the exercise of judicial discretion. *Stockwell v. Crawford*, 261.
12. Under the facts in this case, adjourning a term of court without trying an action in which the plaintiff was a party, was an exercise of judicial discretion by the judge. *Stockwell v. Crawford*, 261.
13. The discretion of a judge of the district court pertaining to the setting of causes for trial, the order of their arrangement on the calendar, and the adjournment of terms of this court, is almost unlimited, and oftentimes the rights of a litigant must give way to the superior rights of the public and the necessities of the occasion as governed by the duties of the judge and the terms and business of the several counties of his district. *Stockwell v. Crawford*, 261.
14. At or near the close of the trial, which lasted about two weeks, the lower court, over plaintiff's objection, permitted the filing of an amended answer raising new issues. *Held*, for reason stated in the opinion, that such ruling was an abuse of discretion. *Wood v. Pehrsson*, 357.
15. Where in drawing a jury in a civil action, some jurors called are absent, it is no error to excuse them and draw others in their places. The trial judge has wide discretion in such matters. *State v. Banik*, 417.
16. Defendant was a religious corporation. Service was made upon its secretary, who by reason of the pressure of his personal affairs neglected to defend. The chairman of defendant's trustees called a meeting eight days after the service to consider the controversy. Meeting was held. Preparation for interposing defense was not shown. *Held*, vacating default on such showing was abuse of discretion. *Bazal v. St. Stanislaus Church*, 602.
17. The permitting of redirect examination immediately following cross-examination of the defendant under the statute in plaintiff's main case is discretionary with the trial court, but the better practice is not to allow such redirect examination until defendant's main case. *Luick v. Arends*, 614.

DISTRICT COURT. See Jurisdiction, 198; Practice, 348.

## DISTRICT JUDGE.

1. Filing an affidavit of prejudice against the presiding judge and the county

## DISTRICT JUDGE—continued.

does not divest the former of authority to transfer the case to another county for trial. *State v. White*, 444.

## DIVORCE. See Husband and Wife, 614.

1. The remedy of a party aggrieved by a decree of divorce, if the evidence is insufficient to sustain such decree, is not ordinarily a motion to vacate, but by appeal. *Wiemer v. Wiemer*, 371.
2. The representation referred to, in order to constitute collusion, must be a misrepresentation. *Wiemer v. Wiemer*, 371.
3. In applications to vacate a decree of divorce entered against the applicant under the circumstances of this case, it must appear that she is acting with good motives, and not for an increase of advantage to her. *Wiemer v. Wiemer*, 371.
4. Plaintiff was divorced from defendant for extreme cruelty, and the custody of four small children was given to her, and permanent provision made to her from defendant's property. The supreme court granted plaintiff, after an appeal from the decree, a maintenance for herself and children pending the appeal, and entered an order for payment at stated intervals. Except to a small extent, defendant failed to comply with the order, and upon order to show cause, he failed to purge himself of the contempt. The appeal and order to show cause were argued together. *Held*, the supreme court will not refuse his appeal from that part of the decree relating to permanent maintenance for the wife and children. *Tuttle v. Tuttle*, 503.
5. Provisions of § 4069, R. C. 1905, to the effect that no divorce can be granted upon the uncorroborated statement, admissions, or testimony of the parties, is intended to prevent collusion, and, following *Cloptin v. Cloptin*, 11 N. D. 212, 91 N. W. 46, it is held that where the facts and circumstances of a divorce case are such as to preclude any possibility of collusion, and the court is convinced, from the facts, of the justice of the plaintiff's cause, only slight corroboration is necessary to sustain a decree in her favor. *Tuttle v. Tuttle*, 503.
6. Certain testimony examined, and, *held*, that irrespective of the foregoing rule, the testimony of the plaintiff as to the acts of the defendant is amply corroborated. *Tuttle v. Tuttle*, 503.
7. In such an action the decree of divorce is a judgment *in rem* to the extent only of judicially establishing the prior existence of the marriage, its dissolution, and the status of the parties thereafter under the decree; such judgment is in all other respects a judgment *in personam*. The legal grounds upon which the degree was granted, and the pleadings in the divorce action, are not to be construed as a part of the judgment *in rem*.

## DIVORCE—continued.

Therefore the grounds upon which such degree is granted, as well as the pleadings in the divorce action, are not admissible as part of a judgment *in rem* in the trial of an issue for alienation of the wife's affections, brought by the husband against a stranger to the divorce proceedings. The divorce decree alone, being a judgment *in rem* to the extent only as above defined, is admissible to establish the prior marriage, prove its dissolution, and fix the status of the parties in relation to the admission of testimony and issues to be determined in the alienation of affections case on trial. *Luick v. Arends*, 614.

## DRAINS. See Eminent Domain, 232.

1. Boards of drain commissioners have only such powers as are expressly conferred by statute, or necessarily implied from powers conferred. *Freeman et al. v. Trimble et al.* 1.
2. Large discretion is vested in drain commissioners in assessing benefits, and determining when outlets may be secured and such discretion will not be interfered with, except in case of fraud or abuse of discretion. *Freeman et al. v. Trimble et al.* 1.
3. Under § 1821, R. C. 1905, as amended by chap. 93, Laws 1907, joint board of drain commissioners have power to secure an outlet to drains established within their district, in foreign territory, where a public necessity exists for securing such outlets. *Freeman et al. v. Trimble et al.* 1.
4. Where it is necessary to improve, deepen, or widen the channel or bed of a river in this state, to drain flooded lands, and such work would not be effectual in draining such lands without extending it for about 12 or 14 miles into Canada, the drain commissioners have power to secure a suitable outlet by improving the river after it enters Canada. *Freeman et al. v. Trimble et al.* 1.
5. That the control of a public improvement after its completion is not vested in the county commissioners, but in the council of a municipality in Canada, by virtue of a by-law of such municipality, does not defeat the latter's right to secure such outlet by improving the river bed. *Freeman et al. v. Trimble, et al.* 1.
6. Sec. 1823, R. C. 1905, as amended in 1907, making it necessary to secure the right of way to land through which drains in this state pass, has no application to improvement of watercourses for drainage purposes. *Freeman et al. v. Trimble et al.* 1.
7. Improving a watercourse after it passes beyond the drainage district for 12 to 14 miles into foreign territory, for the purpose of making an improvement of the watercourse in this state efficacious, is not an unreasonable

**DRAINS—continued.**

- exercise of the power of securing an outlet for drain purposes. *Freeman et al. v. Trimble et al.* 1.
8. The general principle that land benefited by a drain equally with other land that is assessed for such benefits shall not be arbitrarily omitted from such assessment is not applicable where land in foreign territory is not and cannot be assessed for benefits incident to the construction of the drain in the drainage district that is assessed. *Freeman et al. v. Trimble et al.* 1.
  9. Following the rule in *Ross v. Prante*, 17 N. D. 266, 115 N. W. 833, *held*, that chap. 23, R. C. 1905, does not authorize the jury to consider the benefits to the tract of land about to be condemned, in determining full compensation, the duty of the jury is to ascertain the full damages. The benefits are to be determined by the board of drain commissioners. *Heskin v. Herbrandson*, 232.

**ELECTION OF REMEDIES.** See Practice, 187.

**EMINENT DOMAIN.**

1. Following the rule in *Ross v. Prante*, 17 N. D. 266, 115 N. W. 833, *held*, that chap. 23, R. C. 1905, does not authorize the jury to consider the benefits to the tract of land about to be condemned, in determining full compensation, the duty of the jury is to ascertain the full damages. The benefits are to be determined by the board of drain commissioners. *Heskin v. Herbrandson*, 232.
2. If, for any reason, the jury determines the amount of the said benefits, the trial court should disregard such determination as surplusage, and order judgment for the amount of the full damages, if the amounts can be separated. *Heskin v. Herbrandson*, 232.
3. In this case the jury found the full damages to the tract sought to be condemned, and made an independent finding as to the amount the tract was benefited. It was the duty of the trial court to order the entry of judgment for the amount of the full damages. *Heskin v. Herbrandson*, 232.

**EQUITABLE CONVERSION.** See Wills, 359.

**EQUITY.** See Action, 208, 383.

1. The real property described in the real-estate mortgage in suit was owned, at the time of his death, by one Gustaveous Pehrsson, husband of one of the defendants and father of the others, who died testate, in 1895. By the terms of his will his executrix was directed, on or before a certain date,

**EQUITY**—continued.

to sell such real property, and to distribute the proceeds among his children. *Held*, that such provision operated, at the death of the testator, as an equitable conversion of such real property into personalty for the purposes of its administration. *Held*, further, that notwithstanding this fact, such mortgage will be treated in equity as an hypothecation by the mortgagors of whatever interests in such estate they possessed at the date of such mortgage, to the extent of the proceeds of such real property. *Wood v. Pehrsson*, 357.

2. Equity looks beyond the mere form of an instrument to its substance, and will consider and give effect, when possible, to the apparent object and purpose of the parties in executing it. *Wood v. Pehrsson*, 357.

**ESTATES OF DECEDENTS.** See *Executors and Administrators*, 277.

**ESTOPPEL.** See *Appeal and Error*, 198; *Res Judicata*, 614; *Trial*, 335.

1. The mortgagor, by reason of the covenants and recitals contained in the mortgage, is estopped to deny its validity. *Adam v. McClintock*, 482.
2. It does not lie in the mouth of the party who has voluntarily and wrongfully put an end to a contract of employment to say that the party injured has not been damaged, at least, to the amount of what he has been induced, fairly and in good faith, to lay out and expend, including his own services. He is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred. *McLean v. News Pub. Co.* 89.

**EVIDENCE.**

1. If a shipper elects to sue for conversion, and fails to establish the elements necessary to constitute conversion, his action must fail unless his complaint states facts necessary to sustain a recovery on the contract or some other proper form of recovery, as the burden is on the shipper, when he seeks the benefit of the measure of damages for conversion, to prove the act of conversion. *Taughner v. N. P. Ry. Co.* 111.
2. While proof of a demand and refusal to deliver the property or thing may establish conversion in connection with other facts, the demand and refusal are only evidence of conversion when the defendant was in such condition that it might have delivered the property if it would; and conversion does not lie against a common carrier for mere nonfeasance, nor for goods



EVIDENCE—continued.

- stolen from the carrier, nor for negligence causing the loss, nor for bare omission. *Taugher v. N. P. Ry. Co.* 111.
3. When delivery by a carrier to an officer, under a valid writ of attachment, constitutes conversion, proof of the value of the property delivered, as of the date delivered to the officer, is competent proof of value to support a recovery. *Taugher v. N. P. Ry. Co.* 111.
4. A justice's summons bore date two days after the date of filing, with the justice, of the complaint, affidavit, and undertaking for attachment, and issuance of the writ of attachment. *Held*, that on the offer of such papers in evidence in an attempt to show that they were simultaneously issued, it was not error to exclude them from evidence. *Taugher v. N. P. Ry. Co.* 111.
- 4a. Sec. 8530, R. C. 1905, requires a justice of the peace to keep a docket, and enter therein, in continuous order, with the proper date, each act done during the course of litigation, and § 8531, provides that the docket so kept cannot be disputed in a collateral proceeding; that it or a duly certified transcript thereof is competent evidence of the matters of which it relates. *Held*, that the sections referred to make such docket the best evidence of the facts required to be and which are entered therein by the justice, and that, in the absence of any offer of such docket or a transcript thereof, as evidence, no attempt being made to account for its absence, parol evidence is not admissible, under the facts disclosed, to show that the summons was in fact issued simultaneous with the issuance of a writ of attachment. *Taugher v. N. P. Ry. Co.* 111.
5. On an appeal in an action to determine adverse claims, where the judgment roll only is before the supreme court, and it appears by defendant's counterclaim that the tax deed under which he claims and is in possession is a valid tax deed, and the findings show that all tax proceedings were in accordance with the statute, and that all the grounds urged by plaintiff to show defects in the tax proceedings do not exist,—*held*, that defendant's title is valid, and that the deed under which he claims vested a complete title in him, and that the deed under which the plaintiff claims conveyed nothing. *Murray v. Lamson*, 125.
6. The allowance of answers to leading questions, or questions which assume facts not proven, is strictly discretionary with trial judges, and unless there appears a clear abuse of that discretion, appellate courts will not disturb their ruling. *State v. Empting*, 128.
7. Objections to questions, and motions to strike out answers, considered, and the rulings of the trial court sustained. *State v. Empting*, 128.
8. It is not permissible to prove another and independent offense against the defendants on the ground that it shows a motive for the commission of

## EVIDENCE—continued.

- the crime charged, unless such proof fairly and reasonably tends to show such motive. *State v. Hakon*, 133.
- 8a. It is error to admit proof of acts and declarations of third persons not in the presence of the defendants, unless a conspiracy has been shown between the persons making such declarations or doing such acts and the defendants, and that such acts or declarations were made or done in furtherance of the object of the conspiracy. *State v. Hakon*, 133.
  9. Where the information simply charges malicious and felonious administering of poisons to domestic animals, it is error, in view of the provisions of the statute, to show the poisoning of such animals by exposing poison with intent that it shall be taken by them. *State v. Hakon*, 133.
  10. *Held* that the findings of the trial court in favor of the accused on certain charges are sustained by preponderance of the evidence, but the charge that he has been guilty of disrespect to the court in connection with proceedings in a certain transaction set out in the evidence is not supported by any evidence regarding that transaction. *In re Maloney*, 157.
  11. *Held*, further, that the charge of attempting to deceive the court in violation of his duty as an attorney is not sustained by that degree of clearness which justifies the court in suspending an attorney, particularly in view of the accused's explanation of the transaction and the absence of evidence in direct conflict with his version. *In re Maloney*, 157.
  12. Following *Bank v. Flath*, 10 N. D. 81, 86 N. W. 867, that plaintiff, a purchaser in due course, etc., of a negotiable note, must show himself such, when the defendant pleads and shows that the note was obtained by the payee through fraud, or negotiated in breach of faith, and it is sufficient that plaintiff shows a purchase for value and before maturity; and, further, that good faith does not require the purchaser to inquire as to the purpose for which the note was given, or as to possible defenses, and bad faith is only imputed from knowledge or notice of fraud or defense, and mere knowledge or notice of suspicious circumstances will not defeat recovery. *Held*, further, this rule has not been relaxed by the negotiable instrument law. *Am. Nat'l Bank v. Lundy*, 167.
  13. To defeat recovery on a negotiable note, purchased before maturity, for fraud in the inception of the note or negotiated in breach of faith, the indorsee's actual knowledge of the infirmity or defect, or knowledge of facts amounting to bad faith, must be shown. *Am. Nat'l Bank v. Lundy*, 167.
  14. Sec. 6702, R. C. 1905, provides that constructive notice is notice imputed by the law to a person not having actual notice, and § 6703, R. C. 1905, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instrument law can have no appli-

## EVIDENCE—continued.

- cation to actions upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by § 6358, which defines notice in such case as actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith. *Am. Nat'l Bank v. Lundy*, 167.
15. In an action by an indorsee, before maturity, on a negotiable promissory note, proof that others than the defendants had given notes for a similar consideration, which were in the plaintiff bank, for collection, which bank had been informed by the makers that they suspected fraud in such notes, who thereafter informed the bank that matters were satisfactory and paid the notes, is inadmissible. *Am. Nat'l Bank v. Lundy*, 167.
  16. In a prosecution for violations of the prohibition law, a list of special taxpayers, certified by the internal revenue collector, including defendant's name, was received over objections. *Held*, error for reasons stated in the opinion. *State v. Gottlieb*, 179.
  17. Defendant's receipts for freight shipments are competent evidence as admissions against him. *State v. Tracy*, 205.
  18. Court's caution to the jury during the trial *held* sufficient, in the absence of a request by defendant for more definite instructions. *State v. Tracy*, 205.
  19. It was stipulated that assured died by strychnine poisoning, whether administered by deceased, and if so, with suicidal intent, is left to mere inference by the testimony, and was a question of fact for the jury, and not of law for the court. *Held*, defendant's motion for directed verdict, properly denied. *Paulson v. M. W. of A.* 235.
  20. The law presumes that the insured did not commit suicide, but that the strychnine was administered through accident or mistake, and the burden of proof is upon defendant to overcome such presumption. *Paulson v. M. W. of A.* 235.
  21. Where a fact in issue rests solely upon inferences to be deduced from other facts, and it can be said that reasonable men might fairly differ as to the inferences to be deduced from all the circumstances disclosed, it is a proper case for the jury. *Paulson v. M. W. of A.* 235.
  22. Evidence in this case does not show a contract, and the trial court properly directed the jury to find for the defendant. *Kane v. Sherman*, 249.
  23. The acceptance of rent, as referred to in § 5531, only operates as evidence that the landlord consents to the renewal or extension of the contract; and where the evidence is adequate to establish the fact of such consent without his having received rent, the receipt or failure to receive rent is not material. *Wadsworth v. Owens*, 255.

## EVIDENCE—continued.

24. In this case the evidence shows no agreement to merge titles, and they will be kept separate. *May v. Cummings*, 281.
25. In the absence of evidence of the value of the occupation of lands, the mortgagor is not entitled to any credit upon his notes. He has the burden of showing such value. *May v. Cummings*, 281.
- 25a. Courts will protect the use plaintiff in the control of the suit, and the nominal plaintiff cannot end the litigation by a deed to the defendant, after he has transferred his title to the use plaintiff. In this action, however, the defendant's deed was given prior to the deed to the use plaintiff, and the defendant may plead and prove same as a defense against the use plaintiff. *Hanitch v. Beiseker*, 290.
26. The evidence examined, and *held* to show that the employment of the defendants by the plaintiff was under a contract authorizing them to act as factors for the plaintiff, and not as plaintiff's brokers. Hence, defendants had the right to purchase grain in their own names, and ship the same to plaintiff, retaining title in themselves as security for their advances to plaintiff. *Turner v. Crumpton*, 294.
27. The Code regulating appeals from justice courts requires appellant to furnish appeal bond with sufficient surety, to be approved and filed with the clerk of the district court. Appellant took such appeal and filed the undertaking; the clerk failed to indorse the filing and his approval thereof, but filed the undertaking, and notified the justice to transmit the record to the district court, as required by § 8507, R. C. 1905. *Held*, that such notice, which could only be given upon the approval of the undertaking, presumes such approval, notwithstanding the failure to indorse the same. *Schulz v. Dahl*, 302.
28. Plaintiff offered to show that all conditions of the subscription paper were complied with by respondent. Appellant offered to prove a parol agreement with the pastor, who took the subscription, that it should not be binding unless such pastor continued with the church, and that he did not so continue; and that appellant undertook to cancel his subscription when about \$3,000 were subscribed. *Held*, not error to exclude the offer: as appellant's counsel stated that he could not show that \$6,000 was not provided for when the cancelation was attempted. *Thompkins v. Dennie*. 305.
29. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, R. C. 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proof were properly refused. Instructions given, examined and found correct. *State v. Brandner*, 310.
30. Trial courts have wide discretion as to leading questions. The complainant

## EVIDENCE—continued.

was eighteen years old, without education, and testified through an interpreter. She was being examined about acts of illicit intercourse and the birth of a bastard child, born to her three weeks prior to the trial. Under those circumstances, leading questions by the state were properly allowed. *State v. Brandner*, 310.

31. Where mortgaged wheat is sold to an elevator company, and no act of conversation is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand and refusal. *Towne v. St. Anthony & Dak. Elevator Co.* 8 N. D. 200, 77 N. W. 608; *Citizens Nat'l Bank v. Elev. Co.* 335.
32. In an action by a second mortgage of wheat, against an elevator company for converting such wheat, proof of a prior mortgage thereon, duly filed, and unpaid, does not constitute a defense, but when properly brought before the court may be shown in mitigation of damages, to the extent of the amount due on and secured by the prior mortgage. *Citizens Nat'l Bank v. Elev. Co.* 335.
33. A justice's transcript on appeal cannot be impeached collaterally in the district court, which properly denies defendant's motion for an order requiring the justice to alter his docket entries, for the same reason that court properly refused to receive parol proof contradicting such entries. *Heard v. Holbrook*, 349.
34. Under the facts of this case, *held*, in the absence of fraud or mistake, it will be presumed that accountings and settlements were fairly made and embraced all prior transactions between the parties. *Held*, further, that burden is on defendant to overthrow such presumptions in which they have failed, and to show that such settlements were erroneous in respect to any item in the account. *Wood v. Pehrsson*, 357.
35. It is contended on behalf of one of the defendants that she was, at the time of signing the notes and mortgages, of unsound mind and mentally incompetent to enter into a binding obligation. The evidence fails to show that she was "a person entirely without understanding," within the meaning of §§ 4018, 4019, R. C. 1905, and it is accordingly held that such defense is not established. *Wood v. Pehrsson*, 357.
36. In applications to vacate a decree of divorce entered against the applicant under the circumstances of this case, it must appear that she is acting with good motives, and not for an increase of advantage to her. *Wiemer v. Wiemer*, 371.
37. A presumption in favor of regularity of taking deposition, and proper performance of duty by the officer taking same, applies in the absence of proof to the contrary; and the burden to rebut such presumption is upon the party seeking to suppress the deposition. *Patrick v. Nurnberg*, 377.

## EVIDENCE—continued.

38. In the absence of proof it will be presumed the officer taking the deposition, or the witness testifying by deposition, reduced the same to writing, and the testimony may be examined to supplement the officer's certificate in such respect. *Patrick v. Nurnberg*, 377.
39. Those dealing with a municipal corporation, a village, are presumed to know the extent of its powers, and cannot hold it liable because of representations or contracts of its officers concerning matters not legally within its corporate powers. *Hart v. Wyndmere*, 383.
40. Evidence examined and *held* sufficient to sustain the verdict rendered, and judgment ordered thereon. *Hart v. Wyndmere*, 383.
41. In claim and delivery, judgment for the value of the property and damages may be rendered where the property has been destroyed or lost and cannot be returned. In such case, with no proof to the contrary, it will be presumed, as against the defendant, that the property has been destroyed or lost and cannot be returned, but there is no such presumption against the sureties on the bond; as against them such exceptional facts warranting a money judgment must be alleged and proved in a suit on the bond. *Larson v. Hanson*, 411.
42. In bastardy proceedings, where the question of the premature birth of the child is involved, it is not error to ask the mother to state generally the length of the child at the time of birth, and to use her answer as basis for hypothetical questions propounded to a physician in order to elicit his opinion as to whether the child was, in fact, prematurely born. *State v. Banik*, 417.
- 42a. Evidence examined, and *held* sufficient to justify the verdict. *State v. Banik*, 417.
43. Construing § 5948, R. C. 1905, *held*, that the company cannot be permitted to show that the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment of the receipt of the premium. *Harrington v. Mut. Life Ins. Co.* 447.
44. Provisions of § 4069, R. C. 1905, to the effect that no divorce can be granted upon the uncorroborated statement, admissions, or testimony of the parties, is intended to prevent collusion, and, following *Cloptin v. Cloptin*, 11 N. D. 212, 91 N. W. 46, it is *held*, that where the facts and circumstances of a divorce case are such as to preclude any possibility of collusion, and the court is convinced from the facts of the justice of the plaintiff's cause, only slight corroboration is necessary to sustain a decree in her favor. *Tuttle v. Tuttle*, 503.
45. Certain testimony examined, and *held*, that, irrespective of the foregoing rule, the testimony of the plaintiff as to the acts of the defendant is amply corroborated. *Tuttle v. Tuttle*, 503.

## EVIDENCE—continued.

- 45a. The trial court properly sustained objections to certain hypothetical questions, there being no evidence upon which to base the expert testimony offered. *State v. Goetz*, 569.
- 45b. Evidence examined, and *held* sufficient to sustain conviction. *State v. Goetz*, 569.
46. Evidence examined, and *held* sufficient to sustain conviction for maintaining a common nuisance. *State v. Schumacher*, 591.
- 46a. Admissions of guilt made by the defendant to the assistant state's attorney, to procure discontinuance of prosecution, are admissible under the evidence in this case, and are not privileged as communications between attorney and client. *State v. Schumacher*, 591.
47. In such an action the decree of divorce is a judgment *in rem* to the extent only of judicially establishing the prior existence of the marriage, its dissolution, and the status of the parties thereafter, under the decree. Such judgment is in all other respects a judgment *in personam*. The legal grounds upon which the decree was granted, and the pleadings in the divorce action, are not to be construed as part of the judgment *in rem*. Therefore the grounds upon which such decree is granted, as well as the pleadings in the divorce action, are not admissible as part of a judgment *in rem*, in the trial of an issue for alienation of the wife's affections, brought by the husband against a stranger to the divorce proceedings. The divorce decree alone, being a judgment *in rem* to the extent only as above defined, is admissible to establish the prior marriage, prove its dissolution, and fix the status of the parties in relation to the admission of testimony and issues to be determined in the alienation of affections case on trial. *Luick v. Arends*, 614.
48. In this class of actions the existence or nonexistence of the wife's affection being in issue, her declarations to third persons, not in the presence of her husband, as to her love of or hatred for him, when at a time when there existed no motive to deceive, and before the commencement of the alienating influences complained of, are admissible; but any statements of facts or reasons to justify or explain her declarations of love or hatred are inadmissible. *Luick v. Arends*, 614.
49. The statute of a foreign state declaring a forfeiture of a cause of action for alienation of a wife's affections, when the husband has been by such wife, because of his fault, divorced, is given no extraterritorial force; and such statute does not operate to forfeit a right of action existing and sued upon here prior to the granting of the divorce in the state where such statute exists. *Luick v. Arends*, 614.
50. Privileged communications between husband and wife, under § 7253, R. C. 1905, defined and applied in this case, where the former wife was offered as a witness in defendant's behalf against her former husband, to prove

## EVIDENCE—continued.

statements made by the husband and wife, and events occurring during the period of her marriage relation. *Luick v. Arends*, 614.

51. A parent, brother, or sister has the right to counsel a married son, daughter, brother, or sister in good faith, within reasonable limits, when not maliciously done and when given for the apparent best interests of the party advised, without the relative so advising being liable to an action for injury caused one party to the marriage resulting from the advice so given; yet this privilege by reason of relationship amounts to but the presumption that the party so advising, because of natural love and affection of near blood relatives for one another, would act only for the best interests and with proper motives toward the person advised. Whether the privilege thus accorded near blood relatives in such matters extends to a brother-in-law of the wife advised in this case is a question of fact for the jury to determine under all the circumstances, under proper instructions from the court. *Luick v. Arends*, 614.
52. A stranger in blood inducing a wife to leave her husband, or taking her away with or without her consent, and encouraging her to remain away from him, does so at his peril, and the burden is on him to show good cause, good faith, and justification for such acts; but the question as to whether such person was justified in so doing is a question for the jury. *Luick v. Arends*, 614.
- 52a. Evidence examined, and *held* insufficient to sustain the verdict. *Luick v. Arends*, 614.

## EXECUTORS AND ADMINISTRATORS. See Wills, 359.

Under the provisions of the Probate Code of this state it is *held* that a foreign corporation is incompetent to receive letters of administration upon the estate of a deceased person, and that therefore county courts have no authority to issue letters of administration to such foreign corporations. *Grunow v. Simonitsch*, 277.

## EXEMPTION. See Bankruptcy, 483; Homestead, 483.

## FACTORS.

The evidence examined, and *held* to show that the employment of the defendants by the plaintiff was under a contract authorizing them to act as factors for the plaintiff, and not as plaintiff's brokers. Hence, defendants had the right to purchase grain in their own names, and ship the same to plaintiff, retaining title in themselves as security for their advances to plaintiff. *Turner v. Crompton*, 294.



**FINDINGS.** See Appeal and Error, 383.

**FORECLOSURE.** See Account, 359; Mechanics' Liens, 208, 211; Mortgages, 287, 495, 540; Public Land, 483.

**FOREIGN CORPORATIONS.** See Corporations, 277.

**FORFEITURE.** See Vendor and Purchaser, 509.

**FRAUD.** See Account, 359; Bills and Notes, 167; Counties, 324; Drains, 1; Judgments, 198; Pleadings, 235; Sales, 478.

1. Without deciding whether § 5710, R. C. 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, R. C. 1905, which provides that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, have any application to a crop raised on land and severed therefrom by one who retains possession thereof after default by him in the terms of an executory contract of purchase, and after the statutory notice has been served on him of the forfeiture and cancelation of such contract, it is *held*, where the vendor has never been in possession of such land, and two years before the crop in controversy was severed therefrom had commenced an action to determine adverse claims thereto, in which the only money judgment demanded was for the value of the use and occupation thereof, and he has remained silent until after the harvesting of two crops,—that he has thereby elected to stand upon his right to recover for the use and occupation, and has waived his right, if any, to recover the value of the crop so raised and severed by the vendee. *Golden Valley L. & C. Co. v. Johnstone*, 101.
  2. Following *Bank v. Flath*, 10 N. D. 81, 86 N. W. 867, that plaintiff, a purchaser in due course, etc., of a negotiable note must show himself such, when the defendant pleads and shows that the note was obtained by the payee through fraud, or negotiated in breach of faith, and it is sufficient that plaintiff shows a purchase for value and before maturity; and, further, that good faith does not require the purchaser to inquire as to the purpose for which the note was given, or as to possible defenses, and bad faith is only imputed from knowledge or notice of fraud or defense, and mere knowledge or notice of suspicious circumstances will not defeat recovery. *Held*, further, this rule has not been relaxed by the negotiable instrument law. *Am. Nat'l Bank v. Lundy*, 167.
- 21 N. D.—45.

## FRAUD—continued.

3. To defeat recovery on a negotiable note, purchased before maturity, for fraud in the inception of the note or negotiated in breach of faith, the indorsee's actual knowledge of the infirmity or defect, or knowledge of facts amounting to bad faith, must be shown. *Am. Nat'l Bank v. Lundy*, 167.
4. Certain testimony held erroneously received in the absence of proof connecting appellant with knowledge of a general scheme on the part of the original payee of the note to defraud parties who gave them. *Am. Nat'l Bank v. Lundy*, 167.
5. Minor questions on admissibility of evidence passed upon. *Am. Natl. Bank v. Lundy*, 167.
6. A purchaser of personal property with the undisclosed intent not to pay the purchase price is a fraud upon the seller, for which he may within a reasonable time rescind the sale and retake possession of the property sold. *Ditton v. Purcell*, 648.
7. The giving of a false and fraudulent check in payment of the purchase price of personal property, with the intent that, after obtaining possession of the property by such means, the notes of the seller barred from collection by bankruptcy would be offset against the purchase price, without the consent of the seller, or a discount from the purchase price forced in settlement, is a fraud on the seller, for which he may rescind the sale and recover his property. *Ditton v. Purcell*, 648.
8. Such a fraudulent sale passes to the defrauding purchaser a title voidable at the option of the seller, if rescinded with reasonable promptness after discovery of the fraud. *Ditton v. Purcell*, 648.
9. A bona fide purchaser of personal property from such fraudulent original purchaser may secure perfect title to the property so purchased. But his vendor's fraudulent acquisition of the property being once established, the burden is on the subpurchaser to prove his good faith purchase without knowledge of fraud or acts imputing notice sufficient to put the subpurchaser on inquiry as to the fraud of his vendor; otherwise, he takes no title superior to that possessed by his vendor,—a voidable one at the option of the original seller. After proof of the fraud of the buyer in the original sale, the burden is not on the seller to further prove the weakness of the subvendee's title, by showing his fraudulent purchase, or his purchase with notice of his vendor's fraud. *Ditton v. Purcell*, 648.

FREIGHT RECEIPTS. See Evidence, 205.

GIFTS. See Bills and Notes, 271.

## GOVERNOR.

Sec. 79, Constitution of North Dakota, provides: If any bill shall not be

**GOVERNOR—continued.**

returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislative assembly, by its adjournment, prevent its return, in which case it shall be a law unless he shall file the same, with his objections, in the office of the secretary of state within fifteen days after such adjournment. *Held*, construing said constitutional provision, that in computing the fifteen days' period in which the governor may exercise the veto power after the adjournment of the legislative assembly, Sundays are not excepted; consequently the attempted veto of house bill No. 410, relating to abstracters of titles, passed by the twelfth legislative assembly on March 3d, became a law on March 18th, and the attempted exercise by the governor of his veto power as to such bill on March 21st is of no force or effect. *State v. Norton*, 473.

**HOMESTEAD.** See Public Lands, 483.

The homestead exemption to the family is dependent upon the mortgagor's title, and that is subject to the prior acquired lien of the mortgage, and the mortgage is not affected by the homestead exemption. *Adam v. McClintock*, 483.

**HOMICIDE.** See Criminal Law, 188.**HUSBAND AND WIFE.** See Divorce, 503.

1. In an action for alienation of the affections of the wife, and for damages resulting, a decree of divorce obtained by the wife from the plaintiff after litigation on the merits, granted because of the husband's adjudged cruel and inhuman treatment of the wife during the period of time in issue under the pleadings in the alienation of affections case, the divorce action and proceedings, including the decree of divorce are not *res judicata* on the questions involved in the alienation of affections case against the third party, and plaintiff is not barred or estopped thereby from recovery against the third party for alienating the affections of the wife. *Luick v. Arends*, 614.
2. In such an action the decree of divorce is a judgment *in rem* to the extent only of judicially establishing the prior existence of the marriage, its dissolution, and the status of the parties thereafter under the decree. Such judgment is in all other respects a judgment *in personam*. The legal grounds upon which the decree was granted, and the pleadings in the divorce action, are not to be construed as a part of the judgment *in rem*. Therefore the grounds upon which such decree is granted, as well as the pleadings in the divorce action, are not admissible as part of a judgment

## HUSBAND AND WIFE—continued.

*in rem* in the trial of an issue for alienation of the wife's affections, brought by the husband against a stranger to the divorce proceedings. The divorce decree alone, being a judgment *in rem* to the extent only as above defined, is admissible to establish the prior marriage, prove its dissolution, and fix the status of the parties in relation to the admission of testimony and issues to be determined in the alienation of affections case on trial. *Luick v. Arends*, 614.

3. In this class of actions, the existence or nonexistence of the wife's affection being in issue, her declarations to third persons, not in the presence of her husband, as to her love of or hatred for him, when made at a time where there exists no motive to deceive, and before the commencement of the alienation influences complained of, are admissible; but any statements of facts or reasons to justify or explain her declarations of love or hatred are inadmissible. *Luick v. Arends*, 614.
4. The statute of a foreign state declaring a forfeiture of a cause of action for alienation of a wife's affection, when the husband has been by such wife, because of his fault, divorced, is given no extraterritorial force; and such statute does not operate to forfeit a right of action existing and sued upon here prior to the granting of the divorce in the state where such statute exists. *Luick v. Arends*, 614.
5. Privileged communications between husband and wife, under § 7253, R. C. 1905, defined and applied in this case, where the former wife was offered as a witness in defendant's behalf against her former husband, to prove statements made by the husband and wife and events occurring during the period of her marriage relation. *Luick v. Arends*, 614.
6. A parent, brother, or sister has the right to counsel a married son, daughter, brother, or sister in good faith, within reasonable limits, when not maliciously done and when given for the apparent best interests of the party advised, without the relative so advising being liable to an action for injury caused one party to the marriage resulting from the advice so given; yet this privilege by reason of relationship amounts to but the presumption that the party so advising, because of natural love and affection of near blood relatives for one another, would act only for the best interests and with proper motives toward the person advised. Whether the privilege thus accorded near blood relatives in such matters extends to a brother-in-law of the wife advised in this case is a question of fact for the jury to determine under all the circumstances, under proper instructions from the court. *Luick v. Arends*, 614.
7. A stranger in blood inducing a wife to leave her husband, or taking her away with or without her consent, and encouraging her to remain away from him, does so at his peril, and the burden is on him to show good cause, good faith, and justification for such acts; but the question as to

## HUSBAND AND WIFE—continued.

whether such person was justified in so doing is a question for the jury.  
Luick v. Arends, 614.

8. Evidence examined, and *held* insufficient to sustain the verdict. Luick v. Arends, 614.

## INDICTMENT AND INFORMATION.

1. An information for keeping a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient. *State v. Bloomdale*, 77.
2. If the time and place of the former conviction, and the court wherein it was had, are definitely stated, it will be held a good allegation of a former conviction. *State v. Bloomdale*, 77.
3. The allegations of the information considered, and *held* sufficient as to a former conviction, as well as to the crime charged as of the present time. *State v. Bloomdale*, 77.
4. Where the information follows the language of the statute making it a crime to wilfully poison domestic animals, and it further designates the animal poisoned as a horse, and states the ownership thereof, no further description of the horse is necessary. *State v. Hakon*, 133.
5. Whether a motion to make an information more definite may ever be granted as a matter of right, not determined, but if permissible, there was no abuse of discretion in denying such motion in this case. *State v. Hakon*, 133.
6. Where the information simply charges malicious and felonious administering of poisons to domestic animals, it is error, in view of the provisions of the statute, to show the poisoning of such animals by exposing poison with intent that it shall be taken by them. *State v. Hakon*, 133.
7. A preliminary examination, or a waiver thereof, is necessary to the filing of an information in the district court for a crime against the laws of the state, except such as are committed during a term of court, barring the special cases in § 9791, R. C. 1905. *State v. Winbauer*, 161.
8. Upon arraignment under an information charging an offense not committed during court, nor included in the exceptions contained in § 9791, R. C. 1905, the proper procedure is by motion to set aside the information. *State v. Winbauer*, 161.
9. On January 12, 1910, defendant waived a preliminary examination upon a charge of keeping and maintaining a nuisance in violation of the prohibition law, at times since July 1, 1909, in certain described premises, and was bound over. On May 5, 1910, information was filed at a term

## INDICTMENT AND INFORMATION—continued.

- of the district court commencing May 3, 1910, charging defendant with the same offense in the same premises, on July 1, 1909, to and including May 2, 1910. *Held*, that the complaint and information charged two distinct offenses, and the 2d of May, 1910, not falling within a term of the district court, the information should have been set aside, as defendant had neither had nor waived a preliminary examination as to the offense. *State v. Winbauer*, 161.
10. The state's attorney filed in the county court an affidavit in the form of a criminal complaint, sworn to positively, showing violations by appellant of the prohibition law; at the same time he filed his information in due form, verified on information, and belief. A motion to quash such information was overruled. *Held*, not error for reasons stated in the opinion. *State v. Gottlieb*, 179.
  11. The provisions of chap. 80, Laws 1909, authorizing the institution of criminal proceedings in the county court by the filing of an information by the state's attorney, should be construed in connection with § 18 of the Constitution, which provides that "no warrant shall issue but upon probable cause, supported by oath or information." *State v. Gottlieb*, 179.
  12. The state's attorney filed his information in the county court, and an affidavit in the form of a criminal complaint, setting forth all the facts alleged in the information. *Held*, that this was a sufficient compliance with § 18 of the Constitution. *State v. Gottlieb*, 179.
  13. The attorney general can file a criminal information in the district court without showing reasons therefor, or why the state's attorney does not so act. *State v. White*, 444.
  14. An information for keeping and maintaining a nuisance, a saloon, need not describe with particularity the place of its commission. An information charging "a certain place located in the city of Bismarck, in said county and state," is sufficient when no abatement of nuisance is sought, or property liened for fine and costs. *State v. White*, 444.

## INJUNCTION. See Assessments, 140; Intoxicating Liquors, 70; Mortgages, 540.

The supreme court, in the exercise of its original jurisdiction, will, under the facts alleged in the petition, and on the application of the attorney general in the name of the state, issue its prerogative writ to enjoin an alleged new county and those assuming to act as its officers, from exercising jurisdiction over the territory embraced within such new county, until the district court, in which is pending a proceeding to determine the validity of the election at which the proposition was submitted for

**INJUNCTION**—continued.

the organization of such county, has finally adjudicated such question.  
*State v. Miller*, 324.

**INSANITY.** See *Contracts*, 359.**INSTRUCTIONS.** See *Appeal and Error*, 188; *Trial*, 562.

1. Objections to certain instructions to the jury *held* without merit. *Wells v. Lisbon*, 34.
2. An instruction as to the corroboration of witnesses, which states that if any witness has "wilfully testified falsely," is sufficient, and it need not be stated that such testimony must be wilfully and intentionally false. *State v. Winney*, 72.
3. An instruction which states that if any witness has wilfully testified falsely, etc., the jury are at liberty to wholly disregard his testimony, "except so far as the same is corroborated by other credible testimony in the case" is not erroneous by reason of the use of the word "testimony" in place of the word "evidence" as these words mean the same, as commonly understood. *State v. Winney*, 72.
4. An instruction in such case is not prejudicially erroneous in not further stating that corroboration may be given to the testimony of a witness by facts and circumstances occurring at the trial. *State v. Winney*, 72.
5. Instructions pertaining to the proprietor and owner of a place where a nuisance is maintained considered, and *held* not erroneous. *State v. Winney*, 72.
6. Under § 9985, R. C. 1905, providing in criminal cases that the court must only charge as to the law of the case, and by § 10026, R. C. 1905, making the jury exclusive judges of all questions of fact, the judge must express no opinion on the facts, nor weigh the evidence, nor give intimation as to the guilt of the accused. *State v. Peltier*, 188.
7. An instruction in a criminal case, which advises the jury of reasons for inflicting the death penalty, is erroneous as an invasion of the rights of the accused to have the question of his life and death passed upon solely by the jury; and this is emphatically so when no reasons are given for imprisonment. *State v. Peltier*, 188.
8. The jury is the sole judge as to the considerations in deciding between the penalty of death or life imprisonment, and the court's attempt to control its discretion is reversible error; and certain instructions set forth in the opinion infringe the defendant's rights to have the jury, uninfluenced, pass upon the penalty. *State v. Peltier*, 188.
9. Court's caution to the jury during the trial, *held* sufficient in the absence

## INSTRUCTIONS—continued.

- of a request by defendant for more definite instructions. *State v. Tracy*, 205.
10. Where, at the time testimony was stricken out, the court fully cautioned the jury to disregard the same, an omission to again instruct the jury to disregard such testimony is not error,—especially when no request is made for such an instruction. *State v. Tracy*, 205.
  11. Instructions not excepted to cannot be reviewed. The designation by counsel of certain portions of proposed instructions submitted to them pursuant to the provisions of § 7021, R. C. 1905, is not equivalent to the taking of exceptions, as required in the following section. *Paulson v. M. W. of A.* 235.
  12. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, R. C. 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proof were properly refused. Instructions given, examined, and found correct. *State v. Brandner*, 310.
  13. Under the facts in this case, *held* not error for the court to fail to admonish the jury with reference to certain statements made by the counsel for the state in his address to the jury. *State v. Banik*, 417.
  14. Defendant asked the following instruction: "I charge you that, in the general course of nature and under the evidence in this case, the period of gestation is from 249 to 285 days, and unless you find that the defendant had sexual intercourse with the complainant within such period, your verdict must be for the defendant." *Held*, refusal not error, the proof showing a wider period of gestation than stated in the request, and the court having instructed on the same matter. *State v. Banik*, 417.
  15. Where a party to the action deems the charge of the court not sufficiently explicit, he should present written requests for instructions. *Landis v. Fyles*, 18 N. D. 587, 120 N. W. 566, followed. *State v. Banik*, 417.
  16. *Held*, that the court did not, in its instructions, misplace the burden of proof, and that defendant was not entitled to a new trial because of the nonappearance of a witness as under subpoena. *State v. Goetz*, 569.

## INSURANCE.

1. In an action on a benefit certificate, the sole issue was assured's suicide, which under its terms avoided the policy. After the case was called, defendant asked to amend its answer by alleging a new defense, based upon fraud and breach of warranty on the part of the assured in effecting the insurance. *Held*, an abuse of discretion to deny the motion. *Paulson v. M. W. of A.* 235.



**INSURANCE—continued.**

2. It was stipulated that assured died by strychnine poisoning; whether administered by deceased, and if so, with suicidal intent, is left to mere inference by the testimony, and was a question of fact for the jury, and not of law for the court. *Held*, defendant's motion for directed verdict properly denied. *Paulson v. M. W. of A.* 235.
3. The law presumes that the insured did not commit suicide, but that the strychnine was administered through accident or mistake, and the burden of proof is upon defendant to overcome such presumption. *Paulson v. M. W. of A.* 235.
4. Construing § 5948, R. C. 1905, *held*, that the company cannot be permitted to show that the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment of the receipt of the premium. *Harrington v. Mut. Life Ins. Co.* 447.
5. In such case, the date of the policy as specified in the contract being binding on the company, *held*, that under the provisions of § 6064, R. C. 1905, the defense that the insured committed suicide cannot be set up, when suicide occurs after the expiration of one year from the date of the policy. *Harrington v. Mut. Life Ins. Co.* 447.
6. Where the insured, while sane, suicides after one year from the date of the policy, the insurer is liable, even if it appeared that the suicide was premeditated before the expiration of the year, and even if the date of the liability, is fixed by the voluntary act of the insured; this being one of the risks assumed by the insurer where the policy provides that the insurer shall not be liable for the insured's death, by his own act, sane or insane, for one year after the issuance of the policy. *Harrington v. Mut. Life Ins. Co.* 447.
7. The Federal court will neither interfere with property in the lawful possession of the state courts, nor tolerate interference by the state courts with property in its custody. *Rock Island Plow Co. v. Western Imp. Co.* 608.
8. Between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain its possession until final judgment. *Rock Island Plow Co. v. Western Imp. Co.* 608.

**INTOXICATING LIQUORS.** See Criminal Law, 205, 259; Evidence, 205; Indictment and Information, 179; Instructions, 72.

1. Whether a building in which a tenant of the owner has maintained a nuisance by keeping and selling intoxicating liquors therein, of which the owner had knowledge prior to the commencement of an action to abate

## INTOXICATING LIQUORS—continued.

- the nuisance, shall be turned over to the owner, after it has been closed by proceedings under § 9373, R. C. 1905, is discretionary with the trial court, and such discretion will not be disturbed except in cases of the abuse thereof. *State v. Bleth*, 27.
2. If the owner complies with § 9373, R. C. 1905, and the court is satisfied of his good faith in intending to abate the nuisance, being aware of the nuisance maintained by his tenant before the abatement proceedings commence does not deprive the owner of the benefit of said action. *State v. Bleth*, 27.
  3. In the trial of a contempt proceeding for violation of an injunction against a liquor nuisance, the state, over objection, introduced a purported copy of a United States stamp for special tax, certified to by the city auditor. *Held*, error, as chap. 189, Laws 1897, under which a copy of special tax stamp was filed with said officer, being unconstitutional, the copy was incompetent evidence for any purpose. *State v. Winbauer*, 70.
  4. The admission of such exhibits, while error, was nonprejudicial, as defendant's guilt was established by the direct, positive, and wholly uncontradicted testimony of three witnesses, who were in no way impeached or discredited. *State v. Winbauer*, 70.
  5. An information for keeping a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient. *State v. Bloomdale*, 77.
  6. If the time and place of the former conviction, and the court wherein it was had, are definitely stated, it will be held a good allegation of a former conviction. *State v. Bloomdale*, 77.
  7. On a trial for the crime of keeping and maintaining a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, the defendant is entitled to ten peremptory challenges to jurors. *State v. Bloomdale*, 77.
  8. The allegations of the information considered, and *held* sufficient as to a former conviction, as well as to the crime charged as of the present time. *State v. Bloomdale*, 77.
  9. On January 12, 1910, defendant waived a preliminary examination upon a charge of keeping and maintaining a nuisance in violation of the prohibition law, at times since July 1, 1909, in certain described premises, and was bound over. On May 5, 1910, information was filed at a term of the district court commencing May 3, 1910, charging defendant with the same offense in the same premises on July 1, 1909, to and including May 2, 1910. *Held*, that the complaint and information charged two distinct offenses, and the 2d day of May, 1910, not falling within a term of the district court, the information should have been set aside, as defendant

## INTOXICATING LIQUORS—continued.

had neither had nor waived a preliminary examination as to the offense. *State v. Winbauer*, 161.

10. In a prosecution for violation of the prohibition law, a list of special taxpayers, certified by the internal revenue collector, including defendant's name, was received over objection. *Held* error, for reasons stated in the opinion. *State v. Gottlieb*, 179.
11. An information for keeping and maintaining a nuisance, a saloon, need not describe with particularity the place of its commission. An information charging "a certain place located in the city of Bismarck in said county and state" is sufficient, when no abatement of nuisance is sought, or property liened for fine and costs. *State v. White*, 444.

## JOINDER OF CAUSES. See Practice, 187.

## JUDGE. See Discretion, 2, 261, 417.

The discretion of a judge of the district court, pertaining to the setting of causes for trial, the order of their arrangement on the calendar, and the adjournment of terms of his court, is almost unlimited, and oftentimes the rights of a litigant must give way to the superior rights of the public and the necessities of the occasion as governed by the duties of the judge and the terms and business of the several counties of his district. *Stockwell v. Crawford*, 261.

## JUDGMENT. See Adverse Claims, 101; Appeal and Error, 235; Claim and Delivery, 411; Eminent Domain, 232; Jurisdiction, 198; Mechanics' Liens, 208; Parties, 383.

1. Upon application, not under § 6884, R. C. 1905, providing for the relief of a party from a judgment within one year after notice thereof, etc., taken against him through his mistake, inadvertence, surprise, or excusable neglect, but made upon the ground that such judgment was entered upon a collusive and fraudulent stipulation of parties, and was a fraud upon the voters and taxpayers, against the school district, the judgment defendant, a judgment may be vacated after the expiration of a year by reason of the inherent power of courts of general jurisdiction to set aside collusive and fraudulent judgments. *Williams v. Fairmount School Dist.* 196.
2. Under the facts disclosed on the record in this case and referred to in the opinion, *held*, that the moving party was not guilty of laches in making the application for the order appealed from herein. *Williams v. Fairmount School Dist.*, 198.
3. An application to vacate a judgment obtained by collusion and fraud upon

## JUDGMENT—continued.

- the voters and taxpayers of a school district, made by a party affected, on proper showing, need not be accompanied by an affidavit of merits. *Williams v. Fairmount School Dist.*, 198.
4. Proper procedure for relief from default judgment, under § 6884, R. C. 1905, is by motion to vacate the same, based on an affidavit of merits and a proposed verified answer. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  5. On such an application the affidavit of merits cannot be controverted except as to matters therein stated, other than that constituting the merits of the proposed defense. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  6. On an appeal from an order vacating a default judgment, granted on such an application, only the order, with the moving papers on which the same is based, will be considered by this court. Testimony taken subsequent to the ruling appealed from cannot be considered, with the moving papers, on such an appeal. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  7. The ruling of the trial court on a motion to vacate a default judgment, made under said § 6884, will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court by said statute. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  8. The exercise of the court's discretion on such an application should tend, in a reasonable degree, to bring about a trial on the merits, when the circumstances are such as to lead the court to hesitate upon the motion to open the default. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  9. When application is made to the district court, under § 6884, R. C. 1905, for relief from a default judgment, the fact that both the plaintiff and the garnishee had signed a stipulation providing, among other things, that the judgment would be opened, and such stipulation had failed through no fault of the parties, is a sufficient excuse for the delay occasioned thereby. *Bismarck Grocery Co. v. Yeager*, 547.
  10. Such application must be accompanied by an affidavit of merits; such affidavit of merits may set up all of the facts of the case, and be presented to the court itself for an inspection of the merits. It is not necessary that the client submit the facts to an attorney upon the merits. *Bismarck Grocery Co. v. Yeager*, 547.
  11. Inconvenience to defendant, being busy with harvest, and neglecting to attend to his defense and prevent a default, do not furnish the excuse contemplated by the statute admitting the opening of judgments entered through mistake, inadvertence, surprise, or excusable neglect. *Bazal v. St. Stanislaus Church*, 602.
  12. Defendant was a religious corporation. Service was made upon its secretary, who, by reason of the pressure of his personal affairs, neglected to defend. The chairman of the defendant's trustees called a meeting eight days after the service to consider the controversy. Meeting was held.

**JURISDICTION**—continued.

Preparation for interposing defense was not shown. *Held*, vacating default on such showing was abuse of discretion. *Bazal v. St. Stanislaus Church*, 602.

13. In such an action the decree of divorce is a judgment *in rem* to the extent only of judicially establishing the prior existence of the marriage, its dissolution, and the status of the parties thereafter under the decree. Such judgment is in all other respects a judgment *in personam*. The legal grounds upon which the decree was granted, and the pleadings in the divorce action, are not to be construed as a part of the judgment *in rem*. Therefore the grounds upon which such decree is granted, as well as the pleadings in the divorce action, are not admissible as part of a judgment *in rem* in the trial of an issue for alienation of the wife's affections, brought by the husband against a stranger to the divorce proceedings. The divorce decree alone, being a judgment *in rem* to the extent only as above defined, is admissible to establish the prior marriage, prove its dissolution, and fix the status of the parties in relation to the admission of testimony and issues to be determined in the alienation of affections case on trial. *Luick v. Arends*, 614.

**JURISDICTION.** See Bankruptcy, 608; Certiorari, 517; District Judge, 444; Drains, 1, 232; Executors and Administrators, 277.

1. A justice of the peace acquires no jurisdiction to issue a writ of attachment until the summons in the action is issued, as attachment is a provisional or dependent remedy which has no existence until the commencement of an action. *Taughner v. N. P. Ry. Co.* 111.
2. Application to vacate a judgment in district court was made; said court had lost jurisdiction of the action by appeal; on the return of the record from the supreme court, the application was renewed. *Held*, that the first determination did not preclude a new application on the same ground after jurisdiction had reverted in the district court, and the consideration of the second application, while the district court had jurisdiction, did not, under the circumstances of the case, constitute an abuse of discretion. *Williams v. Fairmount School Dist.* 198.
3. Upon application, not under § 6884, R. C. 1905, providing for the relief of a party from a judgment within one year after notice thereof, etc., taken against him through his mistake, inadvertence, surprise, or excusable neglect, but made upon the ground that such judgment was entered upon a collusive and fraudulent stipulation of parties, and was a fraud upon the voters and taxpayers against the school district, the judgment defendant, a judgment may be vacated after the expiration of a year, by reason of the

## JURISDICTION—continued.

- inherent power of courts of general jurisdiction to set aside collusive and fraudulent judgments. *Williams v. Fairmount School Dist.* 198.
4. Under § 174 of R. C. 1905, providing for the approval and consummation of school sales by the board, the disapproval by the board of a sale of school lands, and refusal to cause contract of sale to be executed, of land struck off at a school sale to a bidder, cannot be reviewed or controlled by the courts, the board's conclusion being final. *Fuller v. University Board of School Lands*, 212.
  5. *Held*, further, that such decision of the board is a quasi judicial determination, as distinguished from ministerial acts; and mandamus will not lie to review the same, on the evidence or information upon which such decision was based. *Fuller v. University Board of School Lands*, 212.
  6. Under the facts disclosed by the record in this case, certiorari will not lie to review such action of the board. *Fuller v. University Board of School Lands*, 212.
  7. In February, 1907, plaintiff duly perfected an appeal to the district court from a judgment of the county court. At the time the party appealing had an election to appeal either to the supreme or district court. In March following, chapter 68 of the Session Laws of 1907 took effect, and by its provisions such appeals are restricted to the supreme court. *Held*, that such amendatory statute does not operate to oust the district court of jurisdiction acquired by it over appeals previously taken and perfected. *Jenson v. Frazer*, 267.
  8. Where a defendant appears specially to object to the jurisdiction of a justice of the peace, and thereafter moves for a change of venue, and, at the time fixed for trial by the justice to whom the case was transferred, defends on the merits, he thereby makes a voluntary appearance and waives the benefit of his special appearance and of his objections thereunder to the jurisdiction over his person. Since *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, § 5060, Comp. Laws 1887, has been amended by prescribing what shall constitute a voluntary appearance, and that case no longer controls. *Heard v. Holbrook*, 348.
  9. Summons and complaint were served on a single defendant; other parties joined by stipulation, on whom were served supplemental pleadings, who served answer on codefendant and original plaintiffs, and issue was joined between the original plaintiff and all of such defendants, and between one another, without an order of court, but all parties to the action participated in the trial, offered their testimony, rested and moved for judgment. Objections by such additional parties to the jurisdiction of the court over them or the subject-matter of the action comes too late, and they will be held to have submitted to the jurisdiction of the court the determination

## JURISDICTION—continued.

- of their action, and are bound by the verdict and judgment therein. *Hart v. Wyndmere*, 383.
10. Under the law the duty is upon the city auditor to prepare, and cause to be furnished, the ballots and election supplies necessary to the conduct of such election. *Held*, under the facts peculiar to this case, that this court has the jurisdiction to issue an original writ, and the same is accordingly issued. *State v. Thompson*, 426.
  11. Sec. 7229, R. C. 1905, which prescribes the procedure both in the district and supreme courts in certain actions triable to the court without a jury, does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence. *State v. Templeton*, 470.
  12. After this court has acquired jurisdiction of a cause by appeal, it has inherent power, on proper application, to enter any appropriate order therein, including the power to vacate a stay of execution pending the determination of such appeal, ordered by the trial court upon an inappropriate or insufficient undertaking, unless applicant furnishes the necessary undertaking to secure the stay of execution granted. *Schafer v. District Court*, 476.
  13. The date of the filing, with the board of county commissioners, of a petition for village incorporation, and not the date of the petition itself, gives the board jurisdiction to act. *State ex rel. Johnson v. Clark*, 517.
  14. Power being given over the same territory to two bodies authorized to act, exclusive jurisdiction vests in the party first acting under the power. Hence, the city council of Minot, having secured jurisdiction March 18, 1909, had exclusive jurisdiction, as against the board of county commissioners, to whom a petition was presented for a village incorporation April 7, 1909, by the citizens of North Minot. *State v. Clark*, 517.
  15. The legislature having designated the method of giving notice of the proceedings of the city council with reference to resolutions extending their boundaries, such method cannot be enlarged or diminished by any act or resolution of the city council. Accordingly, *held*, that the notice published and posted in this case complied with the statute, and gave the city council jurisdiction to act. *State ex rel. Johnson v. Clark*, 517.
  16. Filing the return of the sheriff, specified in subdivision 3 of § 6840 of the Code, thirteen days after the filing of the affidavit therein specified, and after the summons had been twice published, is not a sufficient compliance with the provisions of said subdivision to confer jurisdiction by publication of summons, when no other service of the summons was made, and no appearance was made by defendant in the action. *Roberts v. Enderlin Invest. Co.* 594.

**JURY.** See Action, 383; Appeal and Error, 383; Criminal Law, 188; Eminent Domain, 232; Evidence, 614; Instruction, 72, 205; Trial, 43, 205, 235; Verdict, 249, 383.

1. Upon the evidence as to precaution taken by appellant on a stormy night to protect travelers from injury by reason of an excavation in a traveled street in a city, *held*, the question of negligence was properly submitted to the jury. *Wells v. Lisbon*, 34.
2. In determining plaintiff's contributory negligence the jury could consider information which he had received from the night operator, the position of the block signal, as well as other surrounding circumstances. *Davy v. Gt. N. Ry. Co.* 43.
3. The question for the jury in this case was whether an ordinarily prudent person would have been justified in not expecting a train to pass during the time plaintiff was occupied in walking from the station to the place where he was overtaken and injured. *Davy v. Gt. N. Ry. Co.* 43.
4. On a trial for the crime of keeping and maintaining a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, the defendant is entitled to ten peremptory challenges to jurors. *State v. Bloomdale*, 77.
5. The question of defendant's negligence and plaintiff's contributory negligence is, generally, for the jury, and, when passed upon by it, will not ordinarily be disturbed. *Messenger v. Valley City S. & I. Ry. Co.* 82.
6. Under § 8804, R. C. 1905, on finding the accused guilty of murder in the first degree, the jury must designate in their verdict the punishment either by death, or by imprisonment for life. *Held*, the only duty of the court is to inform the jury of the two modes of punishment, and it is left to that body to determine which. *State v. Peltier*, 188.
7. The jury is the sole judge as to the considerations in deciding between the penalty of death or life imprisonment, and the court's attempt to control its discretion is reversible error; and certain instructions set forth in the opinion infringe the defendant's rights to have the jury, uninfluenced, pass upon the penalty. *State v. Peltier*, 188.
8. The jury are not bound to believe or to disbelieve the entire evidence of any witness. It is their duty to examine all of the evidence offered, and to arrive at the truth regarding the matter in dispute. Evidence examined and found to sustain the verdict of the jury. *State v. Brandner*, 310.
9. Where in drawing a jury in a civil action, some jurors called are absent, it is no error to excuse them and draw others in their places. The trial judge has wide discretion in such matters. *State v. Banik*, 417.
10. Courts need not delay a trial until absent jurors are brought in. A litigant is not prejudiced when the jurors to be sworn are competent under the rules of procedure. *State v. Banik*, 417.
11. It is proper to sustain objections to interrogatories propounded prospective



**JURY**—continued.

- jurors, where the examiner assumes the facts in the case in order to ascertain the jurors' opinion in advance, even for the purpose of laying a foundation for peremptory challenges. *State v. Banik*, 417.
12. In bastardy proceedings, where jurors on *voir dire* state that the complaint upon which the proceedings are founded might influence their minds if introduced in evidence, it is no error to overrule a challenge when the juror swears that he can and will try the case upon the evidence presented and the law as given by the court. *State v. Banik*, 417.
  13. Under the facts in this case, *held*, not error for the court to fail to admonish the jury with reference to certain statements made by the counsel for the state in his address to the jury. *State v. Banik*, 417.
  14. Failure to exercise a peremptory challenge is a waiver of previous objection to a juror to whom a challenge for cause had been taken and disallowed. *State v. Goetz*, 569.

**JUSTICE OF THE PEACE.** See Preliminary Examination, 161.

1. A justice of the peace acquires no jurisdiction to issue a writ of attachment until the summons in the action is issued, as attachment is a provisional or dependent remedy which has no existence until the commencement of an action. *Taughner v. N. P. Ry. Co.* 111.
2. A justice's summons bore date two days after the date of filing, with the justice, of the complaint, affidavit, and undertaking for attachment, and issuance of the writ of attachment. *Held*, that on the offer of such papers in evidence, in an attempt to show that they were simultaneously issued, it was not error to exclude them from evidence. *Taughner v. N. P. Ry. Co.* 111.
3. Sec. 8530, R. C. 1905, requires a justice of the peace to keep a docket and enter therein in continuous order, with the proper date, each act done during the course of litigation, and § 8351, provides that the docket so kept cannot be disputed in a collateral proceeding; that it, or a duly certified transcript thereof, is competent evidence of the matters to which it relates. *Held*, that the sections referred to make such docket the best evidence of the facts required to be, and which are, entered therein by the justice, and that, in the absence of any offer of such docket or a transcript thereof, as evidence, no attempt being made to account for its absence, parol evidence is not admissible, under the facts disclosed, to show that the summons was in fact issued simultaneously with the issuance of a writ of attachment. *Taughner v. N. P. Ry. Co.* 111.
4. The Code regulating appeals from justice courts requires appellant to furnish appeal bond, with sufficient surety to be approved and filed with the clerk of the district court. Appellant took such appeal and filed the under-  
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## JUSTICE OF THE PEACE—continued.

- taking; the clerk failed to indorse the filing and his approval thereof, but filed the undertaking, and notified the justice to transmit the record to the district court, as required by § 8507, R. C. 1905. *Held*, that such notice, which could only be given upon the approval of the undertaking, presumes such approval, notwithstanding the failure to indorse the same. *Schulz v. Dahl*, 302.
5. Where a defendant appears specially to object to the jurisdiction of a justice of the peace, and thereafter moves for a change of venue, and, at the time fixed for trial by the justice to whom the case was transferred, defends on the merits, he thereby makes a voluntary appearance and waives the benefit of his special appearance and of his objections thereunder to the jurisdiction over his person. Since *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, § 5060, Comp. Laws, 1887, has been amended by prescribing what shall constitute a voluntary appearance, and that case no longer controls. *Heard v. Holbrook*, 348.
  6. A justice's transcript on appeal cannot be impeached collaterally in the district court, which properly denies defendant's motion for an order requiring the justice to alter his docket entries. For the same reason that court properly refused to receive parole proof contradicting such entries. *Heard v. Holbrook*, 348.
  7. *Mandamus* will not lie to compel the justice to alter his docket entries to conform to alleged facts claimed by the relator to exist. *Heard v. Holbrook*, 349.

LACHES. See Judgments, 198.

LANDLORD AND TENANT. See Claim and Delivery, 255.

1. The defendant leased from the plaintiff certain real estate for the season of 1905. At plaintiff's request, defendant remained thereon during the winter of 1905 and 1906. With no new agreement plaintiff furnished the seed and defendant cropped the land in 1906. *Held*, that § 553, R. C. 1905, providing, "If the lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year,"—applies; and the defendant's rights in the premises and crops for 1906 were governed by the contract for 1905; and the rule is not abrogated because, after accepting seed from the plaintiff and sowing it, defendant refused to execute a new contract like the old one. *Wadsworth v. Owens*, 255.
2. Acceptance of rent under § 5531 is only evidence that the landlord consents to the renewal or extension of the contract; and where the evidence estab-

**LANDLORD AND TENANT**—continued.

lishes such consent without receiving such rent, the receipt or failure to accept rent is immaterial. *Wadsworth v. Owens*, 255.

3. The landlord may elect, when the tenant continues in possession after his lease expires, to treat the tenant as a trespasser, or as holding under the former year's lease. *Wadsworth v. Owens*, 255.

**LEASES.** See *Landlord and Tenant*, 255.

**LEGISLATURE.** See *Statutory Construction*, 55.

All matters pertaining to a division of counties are purely legislative questions, unless regulated by constitutional provisions. *Murray v. Davis*, 64.

**LIENS.** See *Chattel Mortgages*, 335; *Mechanics' Liens*, 211; *Public Lands*, 483.

1. Sec. 1557, Rev. Codes 1905, giving to the state and county a preference in the collection of personal-property taxes over any and all liens on or against the personal property of the tax debtor, construed, and *held*, that the legislative intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by the lien and property included in the same class and assessed with it as one indivisible item, as disclosed by the assessment list. *Adv. Thresher Co. v. Beck*, 55.
2. The vendor in an executory contract for the sale of land never in possession thereof, under the facts in the opinion, has no lien upon the crop raised and severed by the vendee in possession, as security for the use and occupation. *Golden Valley L. & C. Co. v. Johnstone*, 101.

**LIFE INSURANCE.** See *Insurance*, 235, 447.**MANDAMUS.** See *School Lands*, 212.

1. Generally mandamus does not lie to control the exercise of judicial discretion. *Stockwell v. Crawford*, 261.
2. Under the circumstances surrounding the act of the judge in this case, it is *held*, that his attempts to secure the judges of other districts to sit in the trial of the case in his place were purely voluntary; and that mandamus will not lie to compel him to reconvene a term of court and call in another judge, by reason of his not having made every effort possible to secure another judge to sit in the trial of the cause in which the plaintiff was a party. *Stockwell v. Crawford*, 261.
3. Mandamus will not lie to compel a justice to alter his docket entries to

## MANDAMUS—continued.

conform to alleged facts claimed by the relator to exist. *Heard v. Holbrook*, 349.

## MASTER AND SERVANT. See Negligence, 161.

1. Defendant's passenger station is located at the western edge of the village of Bartlett. There are no buildings or crossings west of the station, in the vicinity of said village; but the passing track extends at a distance of a few feet north of the main track, 2,000 feet west of the station. Defendant's railroad had been blockaded for two days, during which no trains had passed Bartlett station. At 8 o'clock in the morning the plaintiff, with others, was sent to do some work at a point 1,600 feet west of the station. On starting he was told by the night operator that no trains were coming, and observed that the block signal was out as a notice to all trains to stop at the station. When 1,400 feet west of the starting point he was struck by a snow plow running as the first section of No. 1, a limited passenger train. The weather was very cold, little wind was blowing, and he and his companions wore fur-lined coats, with their collars turned up and their caps pulled over their ears, and did not look back while going the 1,400 feet. The bell in the engine was obstructed by snow and ice, and could not be rung; but the whistle could be blown. The jury found that it was not blown, and that no warning was given after passing a crossing several hundred feet east of the station, and it was conceded that no stop was made at the station. *Held*, that under the circumstances the court could not say, as a matter of law, it was negligence on the part of the engineer not to blow the whistle after passing the station, but that the question of negligence was for the jury. *Davy v. Gt. N. Ry. Co.* 43.
2. While track and section men assume the risk incident to their occupation, and must protect themselves from approaching trains, there are exceptions in cases where circumstances and conditions are extraordinary or exceptional, in which case the question of contributory negligence may be for the jury. *Davy v. Gt. N. Ry. Co.* 43.
3. *Held*, under the circumstances of this case, the court could not say that the plaintiff was guilty of contributory negligence in not watching for trains when walking on the track 1,400 feet west of the station, and it was for jury. *Davy v. Gt. N. Ry. Co.* 43.
4. In determining the plaintiff's contributory negligence the jury could consider the information that it got from the night operator, the position of the block signal, as well as other surrounding circumstances. *Davy v. Gt. N. Ry. Co.* 43.
5. Although the legislature has required a whistle or ringing of a bell at cer-

**MASTER AND SERVANT—continued.**

- tain places, a railroad company is not relieved from signaling at other places not required by statute, if reasonable care for the safety of its employees and others make it necessary. *Davy v. Gt. N. Ry. Co.* 43.
6. Certain minor questions regarding the admission of evidence passed upon. *Davy v. Gt. N. Ry. Co.* 43.
  7. Plaintiff contracted with defendant, for a salary of \$1,800 per year and one half of the net profits, to manage defendants' business of printing, publishing, and circulating of newspapers in Fargo; contract to continue six years. When this contract was made, plaintiff resided at Langdon, North Dakota, practising law; his business netting him \$2,500 a year. After making his contract plaintiff abandoned his law business, moved his family to Fargo, where his duties under his contract were to be performed, entered upon such duties, faithfully performed them for nearly three months, when, it is alleged, that defendant wrongfully and without cause discharged him. In an action for damages for such discharge, plaintiff offered proof of his reasonable expenses in so removing, the worth of his services, and, as tending to prove the latter fact, offered to show his earning capacity at Langdon when he made the contract, which offer was rejected. *Held*, error, for reasons stated in the opinion. The prospective profits being too uncertain and conjectural for approximate measurement, the rule for measuring the plaintiff's damages is that he may recover the amount expended on the face of the contract including allowance for his time and services. *McLean v. News Pub. Co.* 89.
  8. It does not lie in the mouth of a party who has wrongfully and voluntarily put an end to a contract, of employment, to say that the party injured has not been damaged, at least, to the amount that he has been induced, fairly and in good faith, to lay out and expend, including his own services. He is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred. *McLean v. News Pub. Co.* 89.

**MAXIMS.** See Words and Phrases, 462.

**MECHANICS' LIENS.**

1. Recovery of judgment against the debtor in a suit at law does not waive the right to a lien, nor bar an equitable action to enforce it. *Erickson v. Russ*, 208.
2. In the absence of statutory requirement, the lienor is not required to exhaust his remedy at law before resorting to his lien. *Erickson v. Russ*, 208.
3. The remedy for the enforcement of a mechanic's lien by foreclosure, as pre-

**MECHANICS' LIENS—continued.**

scribed by § 6245, R. C. 1905, is not governed by § 7481, R. C. 1905, relating to the foreclosure of real-estate mortgages. *Erickson v. Russ*, 208.

4. One who purchases premises subject to a mechanics' lien cannot compel the lienor to exhaust legal remedies against the original debtor before resorting to his lien. *Erickson v. Russ*, 208.

**MERGER.**

1. Whether or not a mortgage is merged in a deed given by the mortgagor to the mortgagee depends upon the intent and interest of the latter. *May v. Cummings*, 281.
2. In this case the evidence shows no agreement to merge titles, and they will be kept separate. *May v. Cummings*, 281.

**MISTAKE.** See Account, 357.

**MORTGAGES.** See Bankruptcy, 483; Contracts, 359; Public Lands, 483; Wills, 359.

1. Whether or not a mortgage on land is merged in a deed given by the mortgagor to the mortgagee depends upon the intent and interest of the mortgagee. *May v. Cummings*, 281.
2. In this case the evidence shows no agreement to merge titles, and they will be kept separate. *May v. Cummings*, 281.
3. In the absence of evidence of the value of occupation of lands, the mortgagor is not entitled to any credit upon his notes. He must show such value. *May v. Cummings*, 281.
4. The holder of a mortgage upon real estate may maintain an action to foreclose it at the same time that he is asserting title to the same premises under a quitclaim deed from the mortgagor. *May v. Cummings*, 281.
5. While foreclosing his mortgage in an appropriate action, he has a right to maintain an action to quiet title based upon his quitclaim deed, and it is error for the trial court to force him to elect between the two actions. *May v. Cummings*, 281.
6. Under § 6156, R. C. 1905, the title afterwards acquired by patent to the homesteader inures to the mortgagee as of the date of the execution and delivery of the mortgage. *Adam v. McClintock*, 483.
7. The mortgagor, by reason of the recitals and covenants contained in the mortgage, is estopped to deny its validity. *Adam v. McClintock*, 483.
8. The homestead exemption to the family is dependent upon the mortgagor's title, and is subject to the prior acquired lien of the mortgage and the

## MORTGAGES—continued.

mortgage is not affected by the homestead exemption. *Adam v. McClintock*, 483.

9. Action to quiet title; defendants base theirs on a foreclosure by advertisement and sheriff's deed pursuant thereto. The mortgage was for \$25. Before the foreclosure proceedings plaintiff, in good faith, offered to pay the sum due, which was refused, but failed to technically comply with the statute as to tender by deposit in a bank and notice, although he deposited the amount, less 35 cents. Knowing plaintiff's willingness and desire to pay what was due, the holder of the mortgage began foreclosure by publication in a newspaper 70 miles from the land, there being newspapers in the immediate vicinity thereof, evidently to keep plaintiff in ignorance of the proceedings. On the day of the sale, the holder of the mortgage bid it in for the paltry sum of \$25 and costs, and was the only bidder. Plaintiff knew nothing of the sale until after the sheriff's deed issued. *Held*, that the power of sale was not exercised in good faith, and such foreclosure and deed were void. *Hedlin v. Lee*, 495.
10. The person having the right to exercise the power of sale in a mortgage is bound to the utmost good faith and dealing towards the mortgagor or owner of the premises and a mere technical compliance with the statute is not sufficient. *Hedlin v. Lee*, 496.
11. The gross inadequacy of price, coupled with the other facts, justifies and requires a court of equity to find that the power of sale was exercised in bad faith, and to annul the proceedings thereunder. *Hedlin v. Lee*, 495.
12. M. E. Wagner gave a warranty deed to the defendant corporation, covenanting "that the same is free from all encumbrances except a mortgage given to McWilliams for \$400," with the other covenants of general warranty. The mortgagors, after said deed had been recorded, paid McWilliams the amount of the mortgage, and took an assignment thereof, which, with the mortgage note past due, they delivered to plaintiff, who had both actual and constructive notice of defendant corporation's rights under the deed. *Held*, that the grantee in such deed did not purchase the land subject to said mortgage, but under the covenant of general warranty in the deed the grantor's liability to pay the mortgage continued, and the law presumes that the assignment was taken in fulfillment of their duty to defend the title by them conveyed, and the assignment operated as an immediate satisfaction of the mortgage, and the plaintiff, by the assignment from the Wagners, did not obtain a lien by mortgage upon said premises, nor revive thereby the mortgage discharged by such payment. *Sommers v. Wagner*, 531.
13. The word "mortgagor," as used in § 7454, R. C. 1905, relative to enjoining

## MORTGAGES—continued.

real-estate mortgage foreclosure sales, includes those persons in privity to and claiming under the mortgagor. *State v. Buttz*, 540.

14. A subsequent mortgagee may make the necessary affidavit and enjoin the sale. *State v. Buttz*, 540.
15. The affidavit upon which the restraining order is based should set forth the facts for the satisfaction of the judge, but they need not be stated with the same particularity required of pleadings. The affidavit in this case examined, and *held* sufficient to confer jurisdiction. *State v. Buttz*, 540.

MOTION. See Criminal Law, 161; Indictment and Information, 133; Judgments, 222; Practice, 470.

## MUNICIPAL CORPORATIONS. See Verdict, 383.

1. In making excavations in the traveled streets of a city, one is bound to do so with due regard to the rights of travelers in that vicinity and use such reasonable precaution as is necessary for their protection. *Wells v. Lisbon*, 34.
2. In such case, ordinary care is required, which depends upon the particular circumstances of the particular case, dependent largely upon atmospheric and other conditions. *Wells v. Lisbon*, 34.
3. Greater care is required in such case upon the part of a municipality in a snowy, dark, or stormy night, than in a clear, moonlight night. *Wells v. Lisbon*, 34.
4. The evidence in this case being conflicting as to the precautions taken by appellant on a stormy night to protect travelers from injury by reason of an excavation in a traveled street of a city, it is *held*, that the question of the defendant's negligence was properly for the jury. *Wells v. Lisbon*, 34.
5. The care required of a traveler in a street of a city, where excavations and other obstructions exist, is such as persons of common and reasonable prudence ordinarily exercise under like circumstances, and must be proportionate to the increased danger from darkness and other atmospheric conditions. *Wells v. Lisbon*, 34.
6. When defendant's dray approached an excavation in appellant's street, between 6 and 6:30 P. M. on the 2d day of January, only one light was burning to warn travelers of danger from such excavation; and that was in the middle of the street, where there was no excavation, but where the street had been obstructed by a plank 18 inches above the surface on which the light was hung, such plank covering only the safe part of the street; and the driver, being unable to see where the excavation was,



## MUNICIPAL CORPORATIONS—continued.

- and assuming that the light marked the place of the excavation, turned away from the light, and his team, floundering in the snow, fell into the excavation and was killed. The question of contributory negligence was for the jury under all the facts and circumstances. *Wells v. Lisbon*, 34.
7. A witness testified as to the manner in which he had seen similar excavations in the same city protected as one reason for supposing that the light marked the excavation. *Held*, evidence was competent to aid the jury in determining the degree of care used, if limited to that purpose when used. *Wells v. Lisbon*, 34.
  8. Objections to certain instructions, *held*, without merit. *Wells v. Lisbon*, 34.
  9. Plaintiff filed a notice of claim with a city auditor in an attempt to comply with §§ 2703, 2704, R. C. 1905. Plaintiff assigned error because two papers, each verified by the claimant, were not filed instead of one. *Held*, that inasmuch as the notice filed contained all the information required by both sections, it was a sufficient compliance with the statute, and it is a matter of indifference whether the whole information required to be given the city council is contained in one paper or two, if sufficient in substance to serve the purpose intended. *Wells v. Lisbon*, 34.
  10. A real-estate owner whose property is about to be assessed to pay for a sewer, in an amount in excess of the sum justly due for that improvement, under a contract between the city and a contractor, may restrain the officers of the city from levying such assessment against his property. *Baker v. LaMoure*, 140.
  11. Where a city and a contractor enter into a contract for the construction of a sewer, and said contract specifies that the work must be done to the satisfaction of the city engineer, such provision is binding upon the city and the contractor, and the city will be restrained from levying assessments against individual property, where the city engineer in good faith refuses to approve of the contractor's work. *Baker v. La Moure*, 140.
  12. The fact that the supervising engineer was appointed by the council especially for the building of the sewer, there being no city engineer, does not affect the question of the binding effect of the contract, or the application of the statutes to the question. *Baker v. La Moure*, 140.
  14. A seller of village warrants for value by such sale impliedly warrants them to be the valid legal warrants of the village, and that the same are not, to the knowledge of the seller, subject to set-off or counterclaim. *Hart v. Wyndmere*, 383.
  14. Delivery by a village of a warrant in payment of a contract providing for payment by it in cash is payment of such contract obligation. *Hart v. Wyndmere*, 383.
  15. Those dealing with a municipal corporation, a village, are presumed to know the extent of its powers, and cannot hold it liable because of representa-

## MUNICIPAL CORPORATIONS—continued.

- tions or contracts of its officers concerning matters not legally within its corporate powers. *Hart v. Wyndmere*, 383.
16. Chap. 45, Laws 1907, providing for the commissioner system of city government, does not authorize cumulative voting in the election of city commissioner. *State v. Thompson*, 426.
  17. Under the law the duty is on the city auditor to prepare and cause to be furnished the ballots and election supplies necessary to conduct such election. *Held*, under the facts peculiar to this case, this court has jurisdiction to issue an original writ, and the same is accordingly issued. *State v. Thompson*, 426.
  18. The date of filing with the county commissioners a petition for village incorporation, and not the date of the petition itself, gives jurisdiction. *Johnson v. Clark*, 517.
  19. Power being given over the same territory to two bodies authorized to act, jurisdiction vests in the first to act under the power. *State v. Clark*, 517.
  20. The legislature having designated the method of giving notice of the proceedings of the city council with reference to resolutions extending their boundaries, such method cannot be enlarged or diminished by resolution of such council. *Held*, the notice published complied with the statute and gave jurisdiction. *State v. Clark*, 517.
  21. A city council, in passing resolutions to add outstanding territory to the limits of the city, calls into motion the exercise of a legislative function. *State v. Johnson*, 517.

## MURDER. See Criminal Law, 188.

## NEGLIGENCE. See Common Carriers, 111; Municipal Corporations, 34.

1. The care required of a traveler in the streets of a city, where excavations and other obstructions exist, is such as persons of common and reasonable prudence ordinarily exercise under like circumstances, and must be proportionate to the increased danger from darkness or other atmospheric conditions. *Wells v. Lisbon*, 34.
2. When defendant's dray approached an excavation in appellant's street between 6 and 6:30 P. M., only one light was burning to warn travelers of danger from such excavation, and such light was in the middle of the street, where there was no excavation, but where the street had been obstructed by a plank 18 inches above the surface on which the light was hung, such plank covering the only safe part of the street; and the driver, being unable to see where the excavation was, and assuming that the light marked the place of the excavation, turned away from the light, and his team, floundering in a snow drift, fell into the excavation and

## NEGLECT—continued.

was killed. The question of contributory negligence was for the jury under all the circumstances and facts of the case. *Wells v. Lisbon*, 34.

3. Defendant's passenger station is on the western edge of the village of Bartlett, with no buildings or crossings west of such station near said village, but a passing track extends at a distance of a few feet north of the main track, 2,000 feet west of the station. Defendant's railroad had been blockaded for two days during which no train had passed Bartlett station. At 8 o'clock in the morning the plaintiff, with others, was sent to do some work at a point 1,600 feet west of the station. On starting he was told by the night operator that there were no trains coming, and observed that the block signal was out as a warning to all trains to stop at the station. When 1,400 feet west of the starting point he was struck by a snow plow running as the first section of No. 1, a limited passenger train. The weather was very cold, little wind was blowing, and he with his companions wore fur-lined coats, with collars turned up and their caps pulled over their ears, and did not look while going the 1,400 feet. The bell in the engine was obstructed by snow and ice and could not be rung, but the whistle could be blown. The jury found that it was blown, and that no warning was given after passing a crossing several hundred feet east of the station, and it was conceded that no stop was made at the station. *Held*, that under the circumstances the court could not say, as a matter of law, that it was negligence for the engineer not to blow the whistle after passing the station, but that negligence was for the jury. *Davy v. Gt. N. Ry. Co.* 43.
4. While track and section men assume risk that is incident to their occupation, and must protect themselves from approaching trains, there are exceptions in cases where circumstances and conditions are extraordinary or exceptional, in which case the question of contributory negligence may be for the jury. *Davy v. Gt. N. Ry. Co.* 43.
5. *Held*, Under the circumstances of this case, the court could not say that plaintiff was guilty of contributory negligence in not watching for trains when walking on the track 1,400 feet west of the station, and it was for the jury. *Davy v. Gt. N. Ry. Co.* 43.
6. In determining plaintiff's contributory negligence, the jury could consider information which he had received from the night operator, the position of the block signal, as well as other surrounding circumstances. *Davy v. Gt. N. Ry. Co.* 43.
7. The question for the jury in this case was whether an ordinarily prudent person would have been justified in not expecting a train to pass, during the time plaintiff was occupied in walking from the station to the place where he was overtaken and injured. *Davy v. Gt. N. Ry. Co.* 43.
8. Although the legislature has required a whistle or ringing of a bell at certain places, a railroad company is not relieved from signaling at other places

## NEGLIGENCE—continued.

not required by statute, if reasonable care for the safety of its employees and all others makes it necessary. *Davy v. Gt. N. Ry. Co.* 43.

9. In an action to recover damages resulting from prairie fires negligently caused by defendant's servants, evidence examined, and held, insufficient to justify the verdict, the record presenting a case of total failure of proof as to the extent of the damages suffered. *Spicer v. N. P. Ry. Co.* 61.
10. The question of defendant's negligence and plaintiff's contributory negligence is generally for the jury, and, when passed upon by it, will not ordinarily be disturbed. *Messenger v. Valley City S. & I. Ry. Co.* 82.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 167, 271;  
Statutory Construction, 167.

NEW TRIAL. See Appeal and Error, 128, 235.

1. Four separate causes of action are pleaded in two of which recovery for negligence in killing animals was sought; the record did not disclose upon what a verdict for \$350 was based. *Held*, error, to refuse a new trial. *Spicer v. N. P. Ry. Co.* 61.
2. A new trial is not to be granted upon ground of newly discovered evidence when it is merely cumulative. *State v. Brandner*, 310.
3. Where no motion for a new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed. *Patrick v. Nurnberg*, 377.
4. Where no motion for a new trial was made, and no specification of error was incorporated in the statement of the case, this court disregards the statement settled, and will not review the evidence or rulings thereon, during the trial, and reviews only the errors apparent from the judgment roll. *Patrick v. Nurnberg*, 377.
5. Sec. 7229, R. C. 1905, which provides the procedure both in the district and supreme courts in certain actions triable without a jury, does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence. *State v. Templeton*, 470.
6. An order for a new trial will not be disturbed on appeal where the record discloses any tenable ground in support of an order. *Citizens National Bank v. Schultz*, 551.
7. In support of a motion for a new trial, respondent furnished an affidavit showing admissions by appellant to a third party prior to the trial having very material relevancy to an important issue of fact. Respondent knew of this only after the trial. *Held*, that such newly discovered evidence was amply sufficient to warrant a new trial. *Citizens Bank v. Schultz*, 551.
8. The charge did not misplace the burden of proof, and defendant is not entitled to a new trial because of the nonappearance of a witness under subpoena. *State v. Goetz*, 569.

**NOTICE.** See Intoxicating Liquors, 70; Recording of Transfers, 608; Trover and Conversion, 335; Vendor and Purchaser, 509.

1. An order is not without notice when based on a former order which states that when certain conditions have been complied with, another order will be made without further notice. *State v. Bleth*, 27.
2. Plaintiff filed a notice of claim with the city auditor in an attempt to comply with the provisions of §§ 2703, 2704, R. C. 1905. Plaintiff assigned error because two papers, each verified by the claimant, were not filed instead of one. *Held*, that inasmuch as the one notice filed contained all the information required by both sections, it was a sufficient compliance with the statute, and it is a matter of indifference whether the whole information required to be given the city council is contained in one paper or two, if sufficient in substance to serve the purpose intended. *Wells v. Lisbon*, 34.
3. Sec. 6702, R. C. 1905, provides that constructive notice is notice imputed by law to a person not having actual notice, and § 6703, R. C. 1905, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instrument law have no application to an action upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by § 6358, which defines notice in such case as actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith. *Am. Nat. Bank v. Lundy*, 167.
4. Certain language in the opinion in *State v. Meyers*, 19 N. D. 804, 124 N. W. 701, wherein it was held that a four weeks' publication of notice of the submission of a county division proposition is essential, was inadvertently used, and the same is disapproved. *State v. Miller*, 324.
5. The recording of a mortgage in the office of the register of deeds of the county in which the land is situated, prior to the final proof on the land so mortgaged, operates as constructive notice to the same effect as though the mortgage had been executed and recorded after the land patent is recorded. *Adam v. McClintock*, 493.
6. The legislature having prescribed the method of giving notice of the proceedings of the city council with reference to resolutions extending their boundaries, such method cannot be enlarged or diminished by any act or resolution of the city council. *Held*, that the notice published and posted gave jurisdiction. *State v. Clark*, 517.

## NOXIOUS WEEDS.

1. Sec. 2086, R. C. 1905, imposes no such duty upon a person to destroy noxious

**NOXIOUS WEEDS—continued.**

weeds upon the land he owns or occupies as will make him liable for damages for failure to destroy, until after the county commissioners have prescribed the time and methods of destruction. Whether it would after the commissioners acted, not determined. *Langer v. Good*, 462.

**NUISANCE.** See Criminal Law, 591; Indictment and Information, 179; Intoxicating Liquors, 27, 77, 444.

Instructions pertaining to the proprietor and owner of a place where a nuisance is maintained, considered, and *held* not erroneous. *State v. Winney*, 72.

**OFFICERS.** See Certiorari, 517; Depositions, 377; Evidence, 70, 150.

The incumbent of a public office, who has the right to hold over until his successor is elected and qualified, has such a special interest as enables him to maintain an action under the provisions of chap. 25, Code Civ. Proc. (§§ 7349, et seq. R. C. 1905), against one who intrudes himself into such office, unless such right has been lost or waived in some manner, either by the voluntary surrender of the office or by some other equivalent act. *Jenness v. Clark*, 150.

**ORDER.**

An order is not without notice when based on a former order which states that when certain conditions have been complied with, another order will be made without further notice. *State v. Bleth*, 27.

**PARTIES.** See Action, 383; Jury, 417.

1. A real-estate owner, whose property is about to be assessed to pay for a sewer, in an amount in excess of the sum justly due for that improvement, under a contract of the city and the contractor, may restrain the officers of the city from levying such assessment against his property. *Baker v. La Moure*, 140.
2. Summons and complaint were served on a single defendant; other parties joined by stipulation, on whom were served supplemental pleadings, who served answer on codefendant and original plaintiffs, and issue was joined between the original plaintiff, and all of such defendants, and between one another, without an order of court, but all parties to the action participated in the trial, offered their testimony, rested and

**PARTIES—continued.**

moved for judgment. Objections by such additional parties to the jurisdiction of the court over them or the subject-matter of the action comes too late, and they will be held to have submitted to the jurisdiction of the court the determination of their action, and are bound by the verdict and judgment therein. *Hart v. Wyndmere*, 383.

**PATENT.** See Recording of Transfers, 483.

**PAYMENT.**

The delivery by a village of its legal warrant in payment of a contract providing for payment by it in cash is payment of such contract obligation. *Hart v. Wyndmere*, 383.

**PERSONAL PROPERTY.** See Chattel Mortgage, 111; Trover and Conversion, 111.

Sec. 1557, R. C. 1905, giving to the state and county a preference in collection of personal-property taxes over any and all liens on or against the personal property of the tax debtor, construed, and *held*, that the legislative intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by the lien, and property included in the same class and assessed with it as one indivisible item as disclosed by the assessment list. *Adv. Thresher Co. v. Beck*, 55.

**PLEADING.** See Brokers, 249; Indictment and Information, 77, 133, 444; Practice, 290; Principal and Surety, 411; Verdict, 61.

1. An information for keeping a common nuisance contrary to § 9373, R. C. 1905, as of a second offense need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient. *State v. Bloomdale*, 77.
2. If the time and place of the former conviction, and the court wherein it was had, are definitely stated, it will be held a good allegation of a former conviction. *State v. Bloomdale*, 77.
3. In an action to determine adverse claims to real property, a demurrer to the complaint, stating as the only ground that several causes of action are improperly used, cannot be sustained when the facts constitute only one cause of action, although the demands for it are inconsistent or applicable to different causes of action which could not be properly united. In de-

## PLEADING—continued.

- termining a demurrer, the demands for relief are no part of the cause of action. *Golden Valley L. & C. Co. v. Johnstone*, 97.
4. On demurrer to the complaint, solely for improper union of several causes of action, it is contended on appeal from an order overruling such demurrer that the complaint does not state a cause of action, and the order overruling the demurrer should be reversed. *Held*, this question is not before the court. *Golden Valley L. & C. Co. v. Johnston*, 97.
  5. In an action on a benefit certificate, the sole issue was assured's suicide, which, under its terms, avoided the policy. After the case called, defendant asked to amend its answer by alleging a new defense, based upon fraud and breach of warranty on the part of the assured in effecting the insurance. *Held*, an abuse of discretion to deny the motion. *Paulson v. M. W. of A.* 235.
  6. Courts have broad discretion as to amendments,—especially where they would necessitate a continuance of the cause. *Paulson v. M. W. of A.* 235.
  7. At or near the close of the trial, which lasted about two weeks, the lower court, over plaintiff's objection, permitted the filing of an amended answer raising new issues. *Held*, for reasons stated in the opinion, that such ruling was an abuse of discretion. *Wood v. Pehrsson*, 357.
  8. An action begun as an equitable action may, by subsequent pleadings, be changed in nature to one at law properly triable on demand to a jury. *Hart v. Wyndmere*, 383.
  9. In claim and delivery, defendants, with sureties, executed a redelivery bond under § 6922, R. C. 1905, "for delivery of the said property to the plaintiffs if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action." Plaintiff recovered a mere money judgment only. In an action against the sureties on the bond the only breach alleged being the nonpayment of such judgment, *held*, the complaint fails to state a cause of action. *Larson v. Hanson*, 411.
  10. Where trial is had and judgment entered on findings sufficient to sustain such judgment, this court will not on appeal review the sufficiency of the pleadings unchallenged in the court below, when such defects could have been remedied by amendment, had suitable objection been made at the trial. *Ditton v. Purcell*, 648.

## POSSESSION. See Adverse Claims, 125; Trover and Conversion, 111; Vendor and Purchaser, 101.

1. It is held that under the facts of this case it is unnecessary to decide whether § 4752, R. C. 1905, which provides that the owner of a thing owns all its products and accession, establishes title to grain raised on land and



**POSSESSION—continued.**

- severed therefrom by one holding possession thereof after forfeiture of an executory contract of purchase, in the vendor as against his vendee, when such vendor has never been in possession of the land; but a review of the authorities discloses them overwhelmingly in favor of ownership in the grower of the crop. *Golden Valley L. & C. Co. v. Johnstone*, 101.
2. The vendor under an executory contract for the sale of land, who is not and never has been in possession thereof, under the facts disclosed in this case and set forth in the opinion, has no lien upon the crop raised and severed by the vendee in possession, as security for the value of the use and occupation. *Golden Valley L. & C. Co. v. Johnstone*, 101.

**POWER OF SALE.** See Mortgages. 495.**PRACTICE.** See Action, 83; Appeal and Error, 27, 222, 267; Bills and Notes, 230; Certiorari, 476, 517; County Courts, 267; Eminent Domain, 232; Indictment, 161, Instructions, 417; Mandamus, 348; Res Judicata, 198.

1. An order is not without notice when based on a former order which states that when certain conditions have been complied with, another order will be made without further notice. *State v. Bleth*, 27.
2. The costs and disbursements incurred in prosecuting contempt proceedings may be taxed against defendant found guilty. *State v. Winbauer*, 70.
3. Secs. 7520, 7534, R. C. 1905, define the nature of the recovery which may be had by plaintiff in actions to determine adverse claims to real property, and a plaintiff who has proceeded under the provisions of said chapter can only recover a money judgment for the value of the use and occupation, except when he shows damages by waste or removal of the property from the premises. *Golden Valley L. & C. Co. v. Johnstone*, 101.
4. Whether a bill of particulars in a criminal case is permissible in this state, not decided, but, conceding it to be, it is always within the discretion of the trial court, which discretion will be interfered with only for abuse. *State v. Empting*, 128.
5. Whether a motion to make an information more definite may ever be granted as a matter of right, not determined, but if permissible there was no abuse of discretion in denying such motion in this case. *State v. Hakon*, 133.
6. Upon arraignment under an information charging an offense not committed during court, nor included in the exceptions contained in § 9791, R. C. 1905, the proper procedure is by motion to set aside the information. *State v. Winbauer*, 161.
7. An application, not under § 6884, R. C. 1905, providing for the relief of a party from a judgment within one year after notice thereof, etc., taken 21 N. D.—47.

## PRACTICE—continued.

- against him through his mistake, inadvertence, surprise, or excusable neglect, but made upon the ground that such judgment was entered upon a collusive and fraudulent stipulation of parties, and was a fraud upon the voters and taxpayers against the school district, the judgment defendant; a judgment may be vacated after the expiration of a year by reason of the inherent power of courts of general jurisdiction to set aside collusive and fraudulent judgments. *Williams v. Fairmount School Dist.* 198.
8. An application to vacate a judgment obtained by collusion and fraud upon the voters and taxpayers of a school district, made by a party affected on proper showing, need not be accompanied by an affidavit of merits. *Williams v. Fairmount School Dist.* 198.
  9. Where, at the time testimony was stricken out, the court fully cautioned the jury to disregard the same, an omission to again instruct the jury to disregard such testimony is not error,—especially when no request is made for such an instruction. *State v. Tracy*, 205.
  10. Recovery of a judgment against the debtor in a suit at law does not waive the right to a lien, nor bar an equitable action to enforce the same. *Erickson v. Russ*, 208.
  11. In the absence of statutory requirement, the lienor is not required to exhaust his remedy at law before resorting to the security of his lien. *Erickson v. Russ*, 208.
  12. The remedy for the enforcement of a mechanic's lien by foreclosure as prescribed by § 6245, R. C. 1905, is not governed by § 7481, R. C. 1905, relating to foreclosure of real-estate mortgages. *Erickson v. Russ*, 208.
  13. One who purchases premises subject to mechanic's lien cannot compel the lienor to exhaust legal remedies against the original debtor before resorting to his lien. *Erickson v. Russ*, 211.
  14. Proper procedure for relief from default judgment, under § 6884, R. C. 1905, is by motion to vacate the same, based on an affidavit of merits and a proposed verified answer. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  15. On such an application the affidavit of merits cannot be controverted except as to matters therein stated, other than that constituting the merits of the proposed defense. *Racine-Sattley Mnfg. Co. v. Pavlicek*, 222.
  16. Instructions not excepted to cannot be reviewed. The designation by counsel of certain portions of proposed instructions submitted to them pursuant to the provisions of § 7021, R. C. 1905, is not equivalent to the making of exceptions, as required in the following section. *Paulson v. N. W. of A.* 235.
  17. Affidavits of prejudice directed at the judge of the district court, and not filed before the commencement of the term at which the case is to be tried, are of no effect, and do not deprive the judge of the right or

**PRACTICE—continued.**

- power to try the action in which such affidavits are filed during term time. *Stockwell v. Crawford*, 261.
18. The holder of a mortgage upon real estate may maintain an action to foreclose the same, at the same time he is asserting title to the same premises under a quitclaim deed from the mortgagor. *May v. Cummings*, 287.
19. While foreclosing his mortgage in an appropriate action, he has the right to maintain an action to quiet title based upon his quitclaim deed, and it is error for the trial court to force him to elect between the two actions. *May v. Cummings*, 287.
20. The defendant may avail himself of any defense he may have had against the nominal plaintiff at the date of the transfer from the nominal to the use plaintiff. *Hanitch v. Beiseker*, 290.
21. Courts will protect the use plaintiff in the control of the suit, and the nominal plaintiff cannot end the litigation by a deed to the defendant, after he has transferred his title to the use plaintiff. In this action, however, the defendant's deed was given prior to the deed to the use plaintiff, and the defendant may plead and prove same as a defense against the use plaintiff. *Hanitch v. Beiseker*, 290.
22. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, R. C. 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proofs were properly refused. Instructions given, examined, and found correct. *State v. Brandner*, 310.
23. A refusal of a discharge in bankruptcy is *res judicata* as to the right to discharge as to all claims scheduled and provable against the estate of the bankrupt. But where several years later second proceedings in bankruptcy are instituted by such bankrupt, and such claims are therein scheduled, it is the duty of the creditor who desires to rely on such former adjudication to plead the same, or otherwise call it to the attention of the bankruptcy court; and if he fails to do so, and a general discharge is granted in the second proceedings, the state court must give effect thereto in any proceeding thereafter brought to enforce the payment of such claim. *Youngman v. Salvage*, 317.
24. In motions for dissolution of an attachment, the facts stated in the original affidavit being denied, the burden is on plaintiff to support the allegations thus made; failing to do this, the attachment should be dissolved. *Weil v. Quam*, 344.
25. While it is not necessary to use the exact language of the statute in the affidavit, yet the facts must be sufficiently stated, from which a conclusion "in language of the statute" would necessarily be drawn. *Weil v. Quam*, 344.

## PRACTICE—continued.

26. Where a defendant appears specially to object to the jurisdiction of a justice of the peace, and thereafter moves for a change of venue, and, at the time fixed for trial by the justice to whom the case was transferred, defends on the merits, he thereby makes a voluntary appearance and waives the benefit of his special appearance and objections thereunder to the jurisdiction over his person. Since *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, § 5060, Comp. Laws, 1887, has been amended by prescribing what shall constitute a voluntary appearance, and that case no longer controls. *Heard v. Holbrook*, 348.
27. A justice's transcript on appeal cannot be impeached collaterally in the district court, which properly denies defendant's motion for an order requiring the justice to alter his docket entries. For the same reason that court properly refused to receive parol proof contradicting such entries. *Heard v. Holbrook*, 348.
28. At or near the close of the trial, which lasted about two weeks, the lower court, over plaintiff's objection, permitted the filing of an amended answer raising new issues. *Held*, for reasons stated in the opinion, that such ruling was an abuse of discretion. *Wood v. Pehrsson*, 357.
29. Where no motion for new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed. *Patrick v. Nurnberg*, 377.
30. A motion to suppress a deposition on the ground that the certificate thereto does not state that the deposition was reduced to writing, or name the persons reducing it to typewriting, should be denied in the absence of some showing of prejudice in support of the motion. *Patrick v. Nurnberg*, 377.
31. The statutory provision, § 7031 of the North Dakota Revised Statutes of 1905, requiring that a verdict must be signed by the foreman of the jury, is directory, not mandatory; and an unsigned verdict properly rendered and received, that would otherwise be valid, is not invalidated by such statutory provision. *Hart v. Wyndmere*, 383.
32. Where, in drawing a jury in a civil action, some jurors called are absent, it is no error to excuse them and draw others in their places. The trial judge has wide discretion in such matters. *State v. Banik*, 417.
33. Courts need not delay a trial until absent jurors are brought in. A litigant is not prejudiced when the jurors to be sworn are competent under the rules of procedure. *State v. Banik*, 417.
34. It is proper to sustain objections to interrogatories propounded prospective jurors, where the examiner assumes the facts in the case in order to ascertain the juror's opinion in advance, even for the purpose of laying a foundation for peremptory challenges. *State v. Banik*, 417.
35. Sec. 7229, R. C. 1905, which prescribes the procedure both in the district and supreme courts in certain actions triable to the court without a jury,

**PRACTICE—continued.**

does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence. *State ex rel. Berndt v. Templeton*, 470.

36. A subsequent mortgagee may make the necessary affidavit and enjoin the sale. *State v. Buttz*, 540.
37. Such application must be accompanied by an affidavit of merits; such affidavit of merits may set up all of the facts of the case, and be presented to the court itself for an inspection of the merits. It is not necessary that the client submit the facts to an attorney upon the merits. *Bismarck Grocery Co. v. Yeager*, 547.
38. On motion for new trial, in support thereof, respondent furnished an affidavit showing admissions by appellant to a third person prior to the trial having very material relevancy to an important issue of fact. Respondent knew of this only after the trial. *Held*, that such newly discovered evidence was amply sufficient to warrant a new trial. *Bank v. Schultz*, 551.
39. Inconvenience to defendant, being busy with harvest, and neglecting to attend to his defense and prevent a default, do not furnish the excuse contemplated by the statute admitting the opening of judgment entered through mistake, inadvertence, surprise, or excusable neglect. *Bazal v. St. Stanislaus Church*, 602.
40. The permitting of redirect examination immediately following cross-examination of the defendant, under the statute, in plaintiff's main case, is discretionary with the trial court, but the better practice is not to allow such redirect examination until defendant's main case. *Luick v. Arends*, 614.
41. Where trial is had and judgment entered on findings sufficient to sustain such judgment, this court will not on appeal review the sufficiency of the pleadings unchallenged in the court below, when such defects could have been remedied by amendment, had suitable objections been made at the trial. *Ditton v. Purcell*, 648.

**PRAIRIE FIRES.** See Negligence, 61.

**PREJUDICE.** See Practice, 377.

A litigant is not prejudiced when the jurors to be sworn are good and lawful men, competent under the rules of procedure to be sworn in his case. *State v. Banik*, 417.

**PRELIMINARY EXAMINATION.** See Criminal Law, 161.

1. A preliminary examination, or a waiver thereof, is necessary to the filing of an information in the district court for a crime against the laws of the

## PRELIMINARY EXAMINATION—continued.

state, except such as are committed during a term of court, barring the special cases in § 9791, R. C. 1905. *State v. Winbauer*, 161.

2. Sec. 35, chap. 80, Laws 1909, providing, "No preliminary examination shall be necessary before trial in criminal actions in the county court,"—is not unconstitutional. *State v. Gottlieb*, 179.

PREROGATIVE WRIT. See *Certiorari*, 198; *Supreme Court*, 324, 426.

PRESUMPTION. See *Appeal and Error*, 188; *Evidence*, 235, 302, 359, 377, 411.

PRINCIPAL AND AGENT. See *Sales*, 478, 575.

## PRINCIPAL AND SURETY.

1. In claim and delivery, defendants, with sureties, executed a redelivery bond under § 6922, R. C. 1905, "for the delivery of the said property to the plaintiffs if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action." Plaintiff recovered a mere money judgment only. In an action against the sureties on the bond, the only breach alleged being the nonpayment of such judgment, *held*, the complaint fails to state a cause of action. *Larson v. Hanson*, 411.
2. The obligation of the sureties for the payment "of such sum as may, for any cause, be recovered against the defendants," is not absolute, but conditional merely. Their obligation will be construed in the light of § 7075, R. C. 1905, which requires that a judgment in plaintiff's favor shall be in the alternative "for the possession or for the recovery of the possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof." *Larson v. Hanson*, 411.
3. In claim and delivery, judgment for the value of the property and damages may be rendered where the property has been destroyed or lost, and cannot be returned. In such case, with no proof to the contrary, it will be presumed, as against the defendant, that the property has been destroyed or lost and cannot be returned, but there is no such presumption against the sureties on the bond; as against them such exceptional facts warranting a money judgment must be alleged and proved in a suit on the bond. *Larson v. Hanson*, 411.

## PROCESS.

1. Filing the return of the sheriff, specified in subdivision 3 of § 6840 of the

**PROCESS**—continued.

Code, thirteen days after the filing of the affidavit therein specified, and after the summons had been twice published, is not a sufficient compliance with the provisions of said subdivision to confer jurisdiction by publication of summons, when no other service of the summons was made, and no appearance was made by defendant in the action. *Roberts v. Enderlin Invest. Co.* 594.

2. The provisions of § 6840 of the Code must be strictly complied with, to render effective an attempted service of summons by publication. *Roberts v. Enderlin Invest. Co.* 594.
3. In cases under subdivision 3 of § 6840 of the Code, the provisions thereof require that the return of the sheriff, therein specified, be filed in the action prior to the first publication of summons, in order to authorize service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 594.
4. In a case arising under subdivision 3 of § 6840 of the Code, the filing of the return of the sheriff, therein specified, prior to the first publication of the summons, is a jurisdictional prerequisite; and a failure to so file such return is fatal to the validity of the service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 594.

**PROMISSORY NOTES.** See Bills and Notes, 167.

**PUBLIC IMPROVEMENT.** See Drains, 1; Municipal Corporations, 140.

**PUBLIC LANDS.** See Mortgages, 483.

1. A single woman mortgaged land held by homestead filing, on which she resided. To secure her father's debt to defendant, such mortgage was recorded. She later married her coplaintiff; they lived together on the land, and claimed homestead thereon under the state laws. The wife, mortgagor, scheduled in bankruptcy the debt, mortgage, and all its covenants, of which defendant had notice. Plaintiff was discharged in bankruptcy of all provable debts so dischargeable. In such proceedings the land was set out to her under the state homestead laws as exempt. She later proved up the homestead on five years' proof, which was patented to her. She and her husband ask in this suit that the mortgage be adjudged invalid, alleging its invalidity, that the homestead exemption defeated the mortgage and the discharge in bankruptcy discharged the debt and mortgage. *Held*, that the mortgage is a valid lien on the land. *Adam v. McClintock*, 483.
2. Under § 6155, R. C. 1905, the title, after-acquired by patent to the home-

**PUBLIC LANDS—continued.**

- steader, inures to the mortgagee as of the date of the execution and delivery of the mortgage. *Adam v. McClintock*, 483.
3. The recording of a mortgage in the office of the register of deeds of the county in which the land is situated, prior to final proof on the land so mortgaged, operates as constructive notice to the same effect as though the mortgage had been executed and recorded after the recording of the patent. *Adam v. McClintock*, 483.
  4. As plaintiff, mortgagor, had resided six and one half years on the tract prior to the institution of bankruptcy proceedings, she had the full, vested, equitable title to the land homesteaded, to which the mortgage attached before bankruptcy. *Adam v. McClintock*, 483.

**QUIETING TITLE.** See Adverse Claims, 101, 125; Actions, 287; Mortgages, 495; Pleading, 97.

1. Evidence examined, and, under *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390, *held*, appellant is entitled to judgment quieting title against all claims of respondent. *Nordhagen v. Enderlin Investment Co.* 25.
2. When a use plaintiff brings suit to quiet title in the name of his grantor, he must rely upon the title as of the date of the transfer from the nominal plaintiff to him. *Henitch v. Beiseker*, 290.
3. The defendant may avail himself of any defense he may have had against the nominal plaintiff at the date of the transfer from the nominal to the use plaintiff. *Hanitch v. Beiseker*, 290.
4. In an action brought in the name of a nominal plaintiff, the use plaintiff cannot claim to be an innocent purchaser without notice, under our recording acts. *Hanitch v. Beiseker*, 290.
5. Courts will protect the use plaintiff in the control of the suit, and the nominal plaintiff cannot end the litigation by a deed to the defendant, after he has transferred his title to the use plaintiff. In this action, however, the defendant's deed was given prior to the deed to the use plaintiff, and the defendant may plead and prove same as a defense against the use plaintiff. *Hanitch v. Beiseker*, 290.

**QUO WARRANTO.** See Certiorari, 517.**RAILROADS.** See Negligence, 43, 61.**REAL PROPERTY.** See Adverse Claims, 101.



**RECEIVER.**

It is *held*, that the vendor, under the facts, circumstances, and pleadings of this case, cannot have a receiver to take possession of and conserve the crop raised, after its severance, for the purpose of subjecting it to his claim for the value of the use and occupation of the premises after forfeiture by the vendee of his contract of purchase. *Golden Valley L. & C. Co. v. Johnstone*, 101.

**RECORDING OF TRANSFERS.**

1. In an action brought in the name of a nominal plaintiff, the use plaintiff cannot claim to be an innocent purchaser without notice, under the recording acts. *Hanitch v. Beiseker*, 290.
2. The recording of a mortgage in the office of the register of deeds of the county in which the land is situated, prior to final proof on the land so mortgaged, operates as constructive notice to the same effect as though the mortgage had been executed and recorded after the recording of the patent. *Adam v. McClintock*, 493.
3. The plaintiff sold goods to L. & K. upon a contract reserving title until payment. The defendant secured possession of the goods before the said contract was filed with the register of deeds, but does not claim to be a subsequent creditor without notice, or a purchaser or incumbrancer in good faith for value. Under those facts the reservation of title is not void as to this defendant. *Rock Island Plow Co. v. Western Impl. Co.* 608.

**REGISTRATION LAW.** See Voters and Elections, 245.

**REMEDIES.** See Practice, 208; Mechanic's Lien, 211.

**REPLEVIN.** See Claim and Delivery, 411.

**RES JUDICATA.** See Jurisdiction, 198.

1. The dismissal, on stipulation, of an appeal from an order of the district court, is not an adjudication precluding application to the district court for an order granting other and different relief from that denied by the order formerly appealed from. *Williams v. Fairmount School Dist.* 198.
2. A refusal of a discharge in bankruptcy is *res judicata* as to the right to discharge as to all claims scheduled and provable against the estate of the bankrupt. But where, several years later, second proceedings in bankruptcy are instituted by such bankrupt, and such claims are therein scheduled, it is the duty of the creditor who desires to rely on such former adjudication to plead the same, or otherwise call it to the attention of the

## RES JUDICATA—continued.

- bankruptcy court; and if he fails to do so, and a general discharge is granted in the second proceedings, the state court must give effect thereto in any proceeding thereafter brought to enforce the payment of such claim. *Youngman v. Salvage*, 317.
3. In an action for alienation of the affections of the wife, and for damages resulting, a decree of divorce obtained by the wife from the plaintiff after litigation on the merits, granted because of the husband's adjudged cruel and inhuman treatment of the wife during the period of time in issue under the pleadings in the alienation of affections case, the divorce action and proceedings, including the decree of divorce, are not *res judicata* on the questions involved in the alienation of affections case against the third party and plaintiff is not barred or estopped thereby from recovery against the third party for alienating the affections of the wife. *Luick v. Arenda*, 614.

RESCISSION. See Bills and Notes, 230; Notes, 648.

RETURN OF ATTACHMENT. See Justice of the Peace, 111.

## RULES OF COURT.

When errors are not assigned in appellant's brief, as required by rule 14, and no reason is disclosed why such rule should be relaxed, this court will not consider the appeal. *Frost v. Hoellinger*, 560.

## SALES.

1. A seller of village warrants for value, by their sale impliedly warrants such securities to be the genuine and legal obligations of the village, and that the same are not, to the knowledge of the transferrer, subject to set-off or counterclaim. *Hart v. Wyndmere*, 383.
2. Action to foreclose chattel mortgage for purchase price of second-hand engine, separator, and other attachments and certain new machinery. Defense, fraud and false representation of plaintiff's agent in soliciting the order and breach of warranty; defendant's counterclaim for damages resulting from alleged false representations and breach of warranty in attempting to operate the machinery, and for freight thereon. Defendant's written order for the second-hand machinery read: "It is fully understood and agreed that said machinery is purchased as second-hand, and is not warranted." Also, "No representations made by any person as an inducement to give and execute this order shall bind the company." The evidence relating to the defense and counterclaim is conflicting. *Held*, findings and conclu-

## SALES—continued.

- sions of the court for plaintiff should not be disturbed. *J. I. Case T. M. Co. v. Erickson*, 478.
3. Plaintiff signed a written order for the purchase of a threshing machine of defendant. On its arrival plaintiff could not give security for its purchase price in compliance with the order, and delivery was not made. Defendant's agent for purposes of delivery and collection then sold plaintiff the machine under an oral contract at a reduction for cash, the machine to be tried, and if not satisfactory returned, and pending trial the cash price was deposited with such agent. The machine proved worthless. The agent transmitted the money to the defendant, who retains it. Plaintiff rescinded the oral contract of sale, and recovered judgment for the amount paid, including freight. *Held*, the delivery of the machine under the oral contract was not a delivery of the machine under the written order notwithstanding that such order by its terms forbade the agent substituting a new contract of sale therefor, and that the machine was delivered was under a new and independent oral contract of sale. *Westby v. Case Threshing Mach. Co.* 575.
  4. That under the oral contract plaintiff had the right to test such machinery by trial, and its acceptance for such purposes was not an acceptance under the written order, even though the company's agent had no authority to make an oral contract of sale or permit such trial before acceptance of the machinery. *Westby v. Case Threshing Co.* 575.
  5. Where the machinery is delivered under a new and independent oral contract of sale, under which the company receives a purchase price on such a sale, made by an agent in excess of the agent's authority, the company, as principal, must disaffirm the unauthorized sale, or they will be held to ratify the agent's acts and such sale under the oral contract. *Westby v. Case Thresh. Mach. Co.* 575.
  6. Where, after rescission of such an oral contract, action is brought by the purchaser to recover the purchase price, on a written executory contract between the parties made prior to the executed oral contract, but under which written contract no delivery was ever had, the written warranties and conditions as such are not parts of the oral contract, unless made so by the terms of such oral contract itself; the executed oral contract entirely superseding in such particulars, as well as all others, the prior written executory contract. Therefore, the written contract and the warranties therein contained and the conditions provided under which it might be rescinded, including manner of rescission, are not parts of the oral contract, and can constitute no defense to an action for the purchase price based on rescission of the oral contract of sale, when delivery was had under such oral contract. *Westby v. Case Thresh. Mach. Co.* 575.
  7. Plaintiff's complaint was prepared to permit proof of either a written contract of sale with rescission, as provided for in such written contract, or

## SALES—continued.

- to permit proof of an oral contract of sale and rescission thereof. Where no motion is made in advance of, or on trial, to compel plaintiff to elect under which contract he will submit proof he has the right of choice, and may, as in this case, rely upon and prove such oral contract. The fact that plaintiff gave notice of rescission in the same manner provided in the written contract, and pleads such rescission, does not of itself stop plaintiff from relying on the oral contract, where such notice is not inconsistent with a rescission of such oral contract. *Westby v. Case Threshing Co.* 575.
8. The plaintiff sold goods to L. & K. upon a contract reserving title under payment. The defendant secured possession of the goods before the said contract was filed with the register of deeds, but does not claim to be a subsequent creditor without notice, or a purchaser or incumbrancer in good faith for value. Under those facts the reservation of title is not void as to this defendant. *Rock Island Plow Co. v. Western Impl. Co.* 608.
  9. After filing the said contract, plaintiff commenced an action in claim and delivery against the defendant, and the sheriff took the goods into his possession. The defendant rebonded and retained the goods. Three days later L. & K. filed a petition in bankruptcy, and their trustee took the said goods from this defendant in an action in the United States courts, but without making this plaintiff a party. *Held*, that the said property was in the lawful custody of the state courts, and that the defendant could not plead the action of the trustee as a defense in the action in the state court. *Rock Island Plow Co. v. Western Impl. Co.* 608.
  10. A purchase of personal property, with the undisclosed intent not to pay the purchase price, is a fraud upon the seller, for which he may within a reasonable time rescind the sale and retake possession of the property sold. *Ditton v. Purcell*, 648.
  11. The giving of a false and fraudulent check in payment of the purchase price of personal property, with the intent that, after obtaining possession of the property by such means, the notes of the seller barred from collection by bankruptcy would be offset against the purchase price without the consent of the seller, or a discount from the purchase price forced in settlement, is a fraud on the seller, for which he may rescind the sale and recover his property. *Ditton v. Purcell*, 648.
  11. A bona fide purchaser of personal property from such fraudulent original purchaser may secure perfect title to the property so purchased. But, his vendor's fraudulent acquisition of the property being once established, the burden is on the subpurchaser to prove his good-faith purchase without knowledge of fraud or acts imputing notice sufficient to put the subpurchaser on inquiry as to the fraud of his vendor; otherwise, he takes no title superior to that possessed by his vendor,—a voidable one at the option of the original seller. After proof of the fraud of the buyer in the orig-

**SALES—continued.**

inal sale, the burden is not on the seller to further prove the weakness of the subvendee's title, by showing his fraudulent purchase or his purchase with notice of his vendor's fraud. *Ditton v. Purcell*, 648.

**SCHOOL LANDS.**

1. Sec. 156 of the Constitution, providing for the Board of University and School Lands, construed with the statutory enactment for its execution, gives said board full power in the sale of school lands, except as otherwise limited by constitutional and statutory enactment. *Fuller v. Board of University and School Lands*, 212.
2. Such grant of power carries with it the duty by the board of using judgment and discretion in such matters, commensurate with the importance of its duties as the trustees of the school fund of the state. *Fuller v. University Board of School Lands*, 212.
3. Under § 174, R. C. 1905, providing for the approval and consummation of school sales by the board, and disapproval by the board of a sale of school lands, and refusal to cause contract of sale to be executed, of land struck off at a school sale to a bidder, cannot be reviewed or controlled by the courts, the board's conclusion being final. *Fuller v. University Board of School Lands*, 212.
4. *Held*, further, that such decision of the board is a quasi-judicial determination, as distinguished from ministerial acts; and mandamus will not lie to review the same, or the evidence or information upon which such decision was based. *Fuller v. University Board of School Lands*, 212.
5. Under the facts disclosed by the record in this case, certiorari will not lie to review such action of the board. *Fuller v. University Board of School Lands*, 212.

**SCHOOLS AND SCHOOL DISTRICTS.** See County Superintendents, 150; Judgments, 198; School Lands, 212; Voters and Elections, 245.

**SECRETARY OF STATE.** See Counties, 324.

**SHERIFFS AND CONSTABLES.** See Attachment, 111; Process, 594.

**STATEMENT OF CASE.** See Appeal and Error 377.

STATE'S ATTORNEY. See Criminal Law, 591; Indictment and Information, 179, 444.

Under the facts in this case, held not error for the court to fail to admonish the jury with reference to certain statements made by the counsel for the state in his address to the jury. *State v. Banik*, 417.

## STATUTES.

1. Under § 1821, R. C. 1905, as amended by chap. 93, Laws 1907, joint boards of drain commissioners have power to secure an outlet to drains established within their district, in foreign territory, where a public necessity exists for securing such outlets. *Freeman v. Trimble*, 1.
2. Sec. 1823, R. C. 1905, as amended in 1907, making it necessary to secure the right of way to land through which drains in this state pass, has no application to improvement of watercourses for drainage purposes. *Freeman v. Trimble*, 1.
3. Whether a building in which a tenant or the owner has maintained a nuisance by keeping and selling intoxicating liquors therein, of which the owner had knowledge prior to the commencement of an action to abate the nuisance, shall be turned over to the owner, after it has been closed by proceedings under § 9373, R. C. 1905, is discretionary with the trial court, and such discretion will not be disturbed except in cases of the abuse thereof. *State v. Bleth*, 27.
4. If the owner complies with § 9373, R. C. 1905, and the court is satisfied of his good faith to abate the nuisance, being aware of the nuisance maintained by his tenant before the abatement proceedings commenced does not deprive the owner of the benefit of said action. *State v. Bleth*, 27.
5. Failure to follow § 7325, R. C. 1905, by enumerating, in an order, all papers on which it is based, does not warrant a dismissal of an appeal from such order. *State v. Bleth*, 27.
6. Plaintiff filed a notice of claim with the city auditor in an attempt to comply with the provisions of §§ 2703, 2704, R. C. 1905. Plaintiff assigned error because two papers, each verified by the claimant, were not filed, instead of one. *Held*, that inasmuch as the one notice filed contained all the information required by both sections, it was a sufficient compliance with the statute, and that it is a matter of indifference whether the whole information required to be given the city council is contained in one paper or two, if sufficient in substance to serve the purpose intended. *Wells v. Lisbon*, 34.
7. Sec. 1557, R. C. 1905, giving to the state and county a preference in collection of personal property taxes over any and all liens on or against the personal property of the tax debtor, construed, and *held*, that the legisla-

## STATUTES—continued.

- tive intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by the lien, and property included in the same class and assessed with it as one indivisible item as disclosed by the assessment list. *Adv. Thresher Co. v. Beck*, 55.
8. On the question of the division of counties, as governed by §§ 2329, 2330, 2331, R. C. 1905, the election under § 2329, does not confer a legal existence on the new or proposed county. *Murray v. Davis*, 64.
  9. Under § 2330, a legal existence is not conferred upon such new county until after the governor has appointed commissioners, and they have accepted and qualified as such. *Murray v. Davis*, 64.
  10. An information for keeping a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, need not describe the former conviction with the same particularity necessary in setting forth the subsequent offense, but a brief description of the former conviction is sufficient. *State v. Bloomdale*, 77.
  11. If the time and place of the former conviction and the court wherein it was had are definitely stated, it will be held a good allegation of a former conviction, *State v. Bloomdale*, 77.
  - 11a. On a trial for the crime of keeping and maintaining a common nuisance contrary to § 9373, R. C. 1905, as of a second offense, the defendant is entitled to ten peremptory challenges to jurors. *State v. Bloomdale*, 77.
  12. Without deciding whether § 5710, R. C. 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, R. C. 1905, which provides that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, have any application to a crop raised on land and severed therefrom by one who retains possession thereof, after default by him in the terms of an executory contract of purchase, and after the statutory notice has been served on him of the forfeiture and cancelation of such contract, it is *held*, where the vendor has never been in possession of such land, and two years before the crop in controversy was severed therefrom had commenced an action to determine adverse claims thereto, in which the only money judgment demanded was for the value of the use and occupation thereof, and he has remained silent until after the harvesting of two crops,—that he has thereby elected to stand upon his rights to recover for the use and occupation, and has waived his right, if any, to recover the value of the crops so raised and severed by the vendee. *Golden Valley L. & C. Co. v. Johnstone*, 101.
  13. In an action to determine adverse claims to real estate under § 31, R. C.

## STATUTES—continued.

- 1905, brought by the vendor on an executory contract for the sale of land, the plaintiff cannot recover both for the value of the crop raised after forfeiture of the contract by the vendee, and for the use and occupation of the land on which the crop was raised, after severance of such crop from the land. *Golden Valley L. & C. Co. v. Johnstone*, 101.
14. Secs. 7520, 7534, R. C. 1905, define the nature of the recovery which may be had by plaintiff in actions to determine adverse claims to real property; and a plaintiff who has proceeded under the provision of said chapter can only recover a money judgment for the value of the use and occupation except when he shows damages by waste or removal of the property from the premises. *Golden Valley L. & C. Co. v. Johnstone*, 101.
15. It is *held*, that under the facts of this case it is unnecessary to decide whether § 4752, R. C. 1905, which provides that the owner of a thing owns all its products and accessions, establishes title to grain raised on land and severed therefrom by one holding possession thereof, after forfeiture of an executory contract of purchase, in the vendor as against his vendee, when such vendor has never been in possession of the land; but a review of the authorities discloses them overwhelmingly in favor of the ownership in the grower of the crop. *Golden Valley L. & C. Co. v. Johnstone*, 101.
16. Sec. 8530, R. C. 1905, requires a justice of the peace to keep a docket and enter therein in continuous order, with the proper date, each act done during the course of litigation, and § 8351 provides that the docket kept cannot be disputed in a collateral proceeding; that it or a duly certified transcript thereof is competent evidence of the matters to which it relates. *Held*, that the sections referred to makes such docket the best evidence of the facts required to be and which are entered therein by the justice, and that, in the absence of any offer of such docket or a transcript thereof, as evidence, no attempt being made to account for its absence, parol evidence is not admissible, under the facts disclosed, to show that the summons was in fact issued simultaneously with the issuance of a writ of attachment. *Taughner v. N. P. Ry. Co.* 111.
17. Under §§ 2787, 2800, R. C. 1905, the certificate of the city engineer that the work has been completed in accordance with the contract is essential before the city officers can properly levy assessments against individual property for the payment of the cost of a sewer. *Baker v. LaMoure*, 140.
18. Sec. 764, R. C. 1905, which prescribes that at each general election there shall be elected in each county a superintendent of schools, whose term shall be two years "and until his successor is elected and qualified," is a constitutional and valid enactment. *Jenness v. Clark*, 150.
19. A person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity. The word "elected" as used in § 764, R. C.



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- 1905, signifies an election of a qualified successor to the incumbent. *Jenness v. Clark*, 150.
20. The incumbent of a public office, who has the right to hold over until his successor is elected and qualified, has such a special interest as enables him to maintain an action under the provisions of chap. 25, Code Civ. Proc. (§§ 7349 et seq. R. C. 1905), against one who intrudes himself into such office, unless such right has been lost or waived in some manner, either by the voluntary surrender of the office or by some other equivalent act. *Janness v. Clark*, 150.
21. A preliminary examination, or a waiver thereof, is necessary to the filing of an information in the district court for a crime against the laws of the state, except such as are committed during a term of court, barring the special cases in § 9791, R. C. 1905. *State v. Winbauer*, 161.
22. Upon arraignment under an information charging an offense not committed during court, nor included in the exceptions contained in § 9791, R. C. 1905, the proper procedure is by motion to set aside the information. *State v. Winbauer*, 161.
23. Sec. 6702, R. C. 1905, provides that constructive notice is notice imputed by the law to a person not having actual notice, and § 6703, R. C. 1905, that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instrument law has no application to actions upon negotiable instruments in the hands of indorsees before maturity, if it ever had such application, being superseded by § 6358, which defines notice in such case as actual knowledge of the infirmity or defect, or knowledge of such facts as to amount to bad faith. *Am. Nat'l Bank v. Lundy*, 167.
24. Under § 9985, R. C. 1905, providing in criminal cases that the court must only charge as to the law of the case; and by § 10026, R. C. 1905, making the jury exclusive judges of all questions of fact, the judge must express no opinion on the facts, nor weigh the evidence, nor give intimation as to the guilt of the accused. *State v. Peltier*, 188.
25. Under § 8804, R. C. 1905, on finding the accused guilty of murder in the first degree, the jury must designate in their verdict the punishment, either by death or by imprisonment for life. *Held*, the only duty of the court is to inform the jury of the two modes of punishment, and it is left to that body to determine which. *State v. Peltier*, 188.
26. Upon application, not under § 6884, R. C. 1905, providing for the relief of a party from a judgment within one year after notice thereof, etc., taken against him through his mistake, inadvertence, surprise, or excusable neglect, but made upon the ground that such judgment was entered upon 21 N. D.—48.

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- a collusive and fraudulent stipulation of parties, and was a fraud upon the voters and taxpayers against the school district, the judgment defendant, a judgment may be vacated after the expiration of a year by reason of the inherent power of courts of general jurisdiction to set aside collusive and fraudulent judgments. *Williams v. Fairmont School Dist.* 198.
27. The remedy for the enforcement of a mechanic's lien by foreclosure, as prescribed by § 6245, R. C. 1905, is not governed by § 7481, R. C. 1905, relating to foreclosure of real-estate mortgages. *Erickson v. Russ*, 208.
28. Under § 174, R. C. 1905, providing for the approval and consummation of school sales by the board, the disapproval by the board of a sale of school lands, and refusal to cause contract of sale to be executed, of land struck off at a school land sale to a bidder, cannot be reviewed or controlled by the courts, the board's conclusion being final. *Fuller v. University Board of School Land*, 212.
29. Proper procedure for relief from default judgment, under § 6884, R. C. 1905, is by motion to vacate the same, based on an affidavit of merits and a proposed verified answer. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
30. The ruling of the trial court on a motion to vacate a default judgment, made under said § 6884, will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court by said statute. *Racine-Sattley Mfg. Co. v. Pavlicek*, 222.
31. In a suit on a promissory note, respondent answered that the only consideration for the note was stock of appellant corporation; that he was not a subscriber to its capital stock; that he had tendered back his shares, with notices of rescission, and demanded a return of the note. On demurrer that the answer stated no defense, *held*, under the provision of § 4198, R. C. 1905, the demurrer should have been sustained. *German Mercantile Co. v. Metz*, 230.
32. Following the rule in *Ross v. Prante*, 17 N. D. 266, 155 N. W. 833, *held*, that chap. 23, R. C. 1905, does not authorize the jury to consider the benefits to the tract of land about to be condemned, in determining full compensation. The duty of the jury is to ascertain the full damages. The benefits are to be determined by the board of drain commissioners. *Heskin v. Herbrandson*, 232.
33. Instructions not excepted to cannot be reviewed. The designation by counsel of certain portions of proposed instructions submitted to them pursuant to the provisions of § 7021, R. C. 1905, is not equivalent to the taking of exceptions, as required in the following section. *Paulson v. M. W. of A.* 235.
34. The registration law, §§ 732 to 746 inclusive, R. C. 1905, do not require women to register or furnish an affidavit, as required of electors who are not

## STATUTES—continued.

- registered, to entitle them to vote for school officers. *Wagar v. Prindeville*, 245.
35. The defendant leased of plaintiff certain real estate for the season of 1905. At the request of the plaintiff, defendant remained upon the premises during the winter of 1905 and 1906. Without any new agreement the plaintiff furnished seed, and the defendant sowed it and cropped the same premises in 1906. *Held*, that § 5531, R. C. 1905, providing that "if a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year," applies; and that the defendant's rights in the premises and crops of 1906 were governed by the contract in writing made for the year 1905; and that this rule is not abrogated by the fact that, after having accepted the seed from the plaintiff and sowed it, the defendant refused to execute a new contract in terms like the old one. *Wadsworth v. Owens*, 255.
36. The acceptance of rent, as referred to in § 5531, only operates as evidence that the landlord consents to the renewal or extension of the contract; and where the evidence is adequate to establish the fact of such consent without his having received rent, the receipt or failure to receive rent is not material. *Wadsworth v. Owens*, 255.
37. The Code regulating appeals from justice courts requires appellant to furnish appeal bond with sufficient surety, to be approved and filed with the clerk of the district court. Appellant took such appeal and filed the undertaking; the clerk failed to indorse the filing and his approval thereof, but filed the undertaking, and notified the justice to transmit the record to the district court, as required by § 8507, R. C. 1905. *Held*, that such notice, which could only be given upon the approval of the undertaking, presumes such approval, notwithstanding the failure to indorse the same. *Schulz v. Dahl*, 302.
38. Chapter 5 of the Code of Criminal Procedure of the year 1895, commonly known as the bastardy act, does not violate § 61 of our state Constitution. Said act is quasi criminal in its procedure, and is germane to the title of said Code. *State v. Brandner*, 310.
39. While bastardy proceedings are quasi criminal in their nature, the trial of the action under § 9653, R. C. 1905, is governed by the rules of civil trials, and the state has the burden of proving its allegations by a fair preponderance of the evidence only. Instructions requiring a stronger degree of proofs were properly refused. Instructions given, examined and found correct. *State v. Brandner*, 310.
40. The issue as to the validity of such election having been duly submitted to the courts for adjudication, it is a legal fraud upon the people who are

## STATUTES—continued.

interested in defeating the organization of such proposed new county, and who are consequently the real parties in interest, for the county auditor, a mere nominal party, to end such litigation in effect by the issuance of his certificate to the secretary of state, as provided by § 2330, R. C. 1905, his right to issue such certificate being dependent upon the validity of such election. *State v. Miller*, 324.

41. Where the attachment is sought under subparagraph 8 of § 6938, R. C. 1905, the property must be described specifically. It is not enough to tell where the goods are, but definite allegations must be made showing what they are. *Weil v. Quam*, 344.
42. It is contended on behalf of one of the defendants that she was, at the time of signing the notes and mortgages, of unsound mind and mentally incompetent to enter into a binding obligation. The evidence fails to show that she was "a person entirely without understanding," within the meaning of §§ 4018, 4019, R. C. 1905, and it is accordingly held that such defense is not established. *Wood v. Pehrsson*, 357.
43. "Collusion is an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." Sec. 4058, R. C. 1905. The evidence in this case failing to show any agreement between the husband and wife, that one of them should commit, or appear to have committed, acts constituting a cause for divorce, and it not appearing that the defendant was represented as having committed acts for such purposes, which she had not committed, no collusion is shown. *Weimer v. Weimer*, 371.
44. The statutory provision, § 7031, N. D. Rev. Stat. 1905, requiring that a verdict be signed by the foreman of the jury, is directory, not mandatory, and an unsigned verdict properly rendered and received, that would otherwise be valid, is not invalidated by such statutory provision. *Hart v. Wyndmere*, 383.
45. In claim and delivery, defendants, with sureties, executed a redelivery bond under § 6922, R. C. 1905, "for the delivery of the said property to the plaintiffs if such delivery shall be adjudged, and for the payment to them of such sum as may, for any cause, be recovered against the defendants in this action." Plaintiff recovered a mere money judgment only. In an action against the sureties on the bond, the only breach alleged being the nonpayment of such judgment, *held*, the complaint fails to state a cause of action. *Larson v. Hanson*, 411.
46. The obligation of the sureties for the payment "of such a sum as may, for any cause, be recovered against the defendants," is not absolute, but conditional merely. Their obligation will be construed in the light of § 7075,

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- R. C. 1905, which requires that a judgment in plaintiffs' favor shall be in the alternative "for the possession or for the recovery of the possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof." *Larson v. Hanson*, 411.
47. Construing § 5948 of the R. C. 1905, *held*, that the company cannot be permitted to show that the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment of the receipt of the premium. *Harrington v. Mut. Life Ins. Co.* 447.
48. In such case, the date of the policy as specified in the contract being binding on the company, *held*, that under the provisions of § 6064, R. C. 1905, the defense that the insured committed suicide cannot be set up, when suicide occurs after the expiration of one year from date of the policy. *Harrington v. Mut. Life Ins. Co.* 447.
49. Sec. 2086, R. C. 1905, imposes no such duty upon a person to destroy noxious weeds upon the land he owns or occupies as will make him liable for damages for failure to destroy until after the county commissioners have described the time and manner of destruction. As to whether action would lie after the commissioners acted, not determined. *Langer v. Goode*, 462.
50. The expression "rights of another," in the maxim set forth in § 6661, R. C. 1905, means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards. *Langer v. Goode*, 462.
51. Sec. 7229, R. C. 1905, which prescribes the procedure, both in the district and supreme courts, in certain actions triable to the court without a jury, does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence. *State v. Templeton*, 470.
52. Under § 6155, N. D. Rev. Codes 1905, the title, after-acquired by patent to the homesteader, inures to the mortgagee as of the date of the execution and delivery of the mortgage. *Adam v. McClintock*, 483.
53. Provision of § 4069, R. C. 1905, to the effect that no divorce can be granted upon the uncorroborated statement, admissions, or testimony of the parties, is intended to prevent collusion, and, following *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, it is *held*, that where the facts and circumstances of a divorce case are such as to preclude any possibility of collusion, and the court is convinced from the facts of the justice of the plaintiff's cause, only slight corroboration is necessary to sustain a decree in her favor. *Tuttle v. Tuttle*, 503.
54. Secs. 7494, 7495, R. C. 1905, which prescribes the manner in which such contracts may be forfeited, provides for the service of written notice by the vendor upon "the vendee or purchaser, or his assigns." *Held*, construing said sections, that the word "assigns," as thus used, includes within its

## STATUTES—continued.

- meaning vendees of the purchaser, when known to the vendor, and that, in order to forfeit such contract as against the rights of G., it was incumbent on plaintiff to cause notice to be served on him as required by said statute. *Williams v. Corey*, 509.
55. Under the statute of this state, § 7810, R. C. 1905, a writ of certiorari is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. *State v. Clark*, 517.
56. A citizen and taxpayer of the territory known as North Minot is a party "beneficially interested" under § 7811, R. C. 1905, requiring that "the application must be made and filed by the party beneficially interested." *State v. Clark*, 517.
57. The word "mortgagor" as used in § 7454, R. C. 1905, relative to enjoining real estate mortgage foreclosure sales, includes those persons in privity to and claiming under the mortgagor. *State v. Buttz*, 540.
58. When application is made to the district court, under § 6884, R. C. 1905, for relief from a default judgment, the fact that both the plaintiff and the garnishee had signed a stipulation providing, among other things, that the judgment would be opened, and such stipulation had failed through no fault of the parties, is a sufficient excuse for the delay occasioned thereby. *Bismarck Grocery Co. v. Yeager*, 547.
59. Sec. 3012, R. C. 1905, which in effect prescribes that all road taxes collected by the county treasurer on property in "any incorporated city, town, or village" shall be turned over to the treasurer of such city, town, or village, "to be expended under the direction of the city council of such city, or of the board of trustees of such town or village . . . in the improvement of the streets or bridges thereof, or of the roads approaching thereto," construed, and held, not to apply to civil townships. *Blue Grass Township v. Morton County*, 557.
60. Secs. 1386, 1398, R. C. 1905, construed, and held, to apply only to counties not formed into civil townships. Sec. 1386 merely provides that in counties not formed into townships the board of county commissioners shall divide the county into road districts, and § 1398 merely provides the manner in which such board shall expend the road taxes collected in such counties. *Blue Grass Township v. Morton County*, 557.
61. Filing the return of the sheriff, specified in subdivision 3 of § 6840 of the Code, thirteen days after the filing of the affidavit therein specified, and after the summons had been twice published, is not a sufficient compliance with the provisions of said subdivision to confer jurisdiction by publication of summons, when no other service of the summons was made, and no

## STATUTES—continued.

appearance was made by defendant in the action. *Roberts v. Enderlin Invest. Co.* 594.

62. The provisions of § 6840 of the Code must be strictly complied with, to render effective an attempted service of summons by publication. *Roberts v. Enderlin Invest. Co.* 594.

63. In cases under subdivision 3 of § 6840 of the Code, the provisions thereof require that the return of the sheriff, therein specified, be filed in the action prior to the first publication of summons, in order to authorize service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 594.

64. In a case arising under subdivision 3 of § 6840 of the Code, the filing of the return of the sheriff, therein specified, prior to the first publication of the summons, is a jurisdictional prerequisite, and a failure to so file such return is fatal to the validity of the service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 594.

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1. A notice of appeal to this court is sufficient that states that the appeal is from an order, fully describing it, although it does not state that it is from the whole of the order, in accordance with the provisions of the statute. *State v. Bleth*, 27.
2. Although the legislature has required a whistle or the ringing of a bell at certain places, a railroad company is not relieved from signaling at other places not required by statute, if reasonable care for the safety of its employees and all others make it necessary. *Davy v. Gt. N. Ry. Co.* 43.
3. Sec. 1557, R. C. 1905, giving to the state and county a preference in the collection of personal-property taxes over any and all liens on or against the personal property of the tax debtor, construed, and *held*, that the legislative intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by

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4. On the question of the division of counties, as governed by §§ 2329, 2330, 2331, R. C. 1905, the election under § 2329 does not confer a legal existence on the new or proposed county. *Murray v. Davis*, 64.
  5. Under § 2330 a legal existence is not conferred upon such new county until after the governor has appointed commissioners, and they have accepted and qualified as such. *Murray v. Davis*, 64.
  6. A preliminary examination, or a waiver thereof, is necessary to the filing of an information in the district court for a crime against the laws of the state, except such as are committed during a term of court, barring the special cases in § 9791, R. C. 1905. *State v. Winbauer*, 161.
  7. Following *Bank v. Flath*, 10 N. D. 81, 86 N. W. 867, it is held that plaintiff, a purchaser in due course, etc., of a negotiable note, must show himself such, when the defendant pleads and shows that the note was obtained by the payee through fraud, or negotiated in breach of faith, and it is sufficient that plaintiff shows a purchase for value and before maturity; and, *held*, further, that good faith does not require the purchaser to inquire as to the purpose for which the note was given, or as to possible defenses, and bad faith is only imputed from knowledge or notice of fraud or defense, and mere knowledge or notice of suspicious circumstances will not defeat recovery. *Held*, further, this rule has not been relaxed by the negotiable instrument law. *Am. Nat'l Bank v. Lundy*, 167.
  8. Sec. 35, chap. 80, Laws 1909, providing "no preliminary examination shall be necessary before trial in criminal actions in the county court," is not unconstitutional. *State v. Gottlieb*, 179.
  9. The remedy for the enforcement of a mechanics' lien by foreclosure as prescribed by § 6245, R. C. 1905, is not governed by § 7481, R. C. 1905, relating to foreclosure of real estate mortgages. *Erickson v. Russ*, 208.
  10. Sec. 156 of the Constitution, providing for the Board of University and School Lands, construed with the statutory enactment for its execution, gives said board full power in the sale of school lands, except as otherwise limited by constitutional and statutory enactment. *Fuller v. Board of University & School L.* 212.
  11. In a suit on a promissory note, respondent answered that the only consideration on the note was stock of appellant corporation; that he was not a subscriber to its capital stock; that he had tendered back his shares, with notice of rescission, and demanded a return of the note. On demurrer that the answer stated no defense, *held*, under the provisions of § 4193, R. C. 1905, the demurrer should have been sustained. *German Mercantile Co. v. Metz*, 230.

## STATUTORY CONSTRUCTION—continued.

12. In February 1907, plaintiff duly perfected an appeal to the district court from a judgment in the county court. At that time the party appealing had an election to appeal either to the supreme or district court. In March following, chapter 68 of the Session Laws of 1907 took effect, and by its provisions such appeals are restricted to the supreme court. *Held*, that such amendatory statute does not operate to oust the district court of jurisdiction acquired by it over appeals previously taken and perfected. *Jenson v. Frazer*, 267.
13. Under the provisions of the Probate Code of this state it is held that a foreign corporation is incompetent to receive letters of administration upon the estate of a deceased person, and that, therefore, county courts have no authority to issue letters of administration to such foreign corporations. *Grunow v. Simonitsch*, 277.
14. Chapter 5 of the Code of Criminal Procedure of the year 1895, commonly known as the bastardy act, does not violate § 61 of our state Constitution. Said act is quasi criminal in its procedure, and is germane to the title of said Code. *State v. Brandner*, 310.
15. It is contended on behalf of one of the defendants that she was, at the time of signing the notes and mortgages, of unsound mind and mentally incompetent to enter into a binding obligation. The evidence fails to show that she was "a person entirely without understanding," within the meaning of §§ 4018, 4019, R. C. 1905, and it is accordingly held that such defense is not established. *Wood v. Pehrsson*, 357.
16. The statutory provision, § 7031, R. C. 1905, requiring that a verdict must be signed by the foreman of the jury, is directory, not mandatory; and an unsigned verdict properly rendered and received, that would otherwise be valid, is not invalidated by such statutory provision. *Hart v. Wyndmere*, 383.
17. Chapter 45 of the Session Laws of 1907, providing for the commission system of city government, does not authorize cumulative voting in the election of the city commissioners. *State v. Thompson*, 426.
18. Construing § 5948, R. C. 1905, *held*, that the company cannot be permitted to show that the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment of the receipt of the premium. *Barrington v. Mut. Life Ins. Co.* 447.
19. Sec. 2086, R. C. 1905, imposes no such duty upon a person to destroy noxious weeds upon the land he owns or occupies as will make him liable for damages for failure to destroy until after the county commissioners have prescribed the time and manner of destruction. As to whether action would lie after the commissioners acted, not determined. *Langer v. Goode*, 462.
20. The expression "rights of another," in the maxim set forth in § 6661, R. C.

## STATUTORY CONSTRUCTION—continued.

- 1905, means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards. *Langer v. Goode*, 462.
21. Sec. 7229, R. C. 1905, which prescribes the procedure both in the district and supreme courts in certain actions triable to the court without a jury, does not take from the district courts the power to entertain motions for new trials upon the ground of newly discovered evidence. *State v. Templeton*, 470.
22. Secs. 7494, 7495, R. C. 1905, which prescribe the manner in which such contracts may be forfeited, provides for the service of written notice by the vendor upon "the vendee or purchaser, or his assigns." *Held*, construing said sections, that the word "assigns," as thus used, includes within its meaning vendees of the purchaser when known to the vendor, and that, in order to forfeit such contract as against the rights of G., it was incumbent on plaintiff to cause notice to be served on him as required by said statute. *Williams v. Corey*, 509.
23. A citizen and taxpayer of the territory known as North Minot is a party beneficially interested under § 7811, R. C. 1905, requiring that "the application must be made and filed by the party beneficially interested." *State v. Clark*, 517.
24. Sec. 3012, R. C. 1905, which in effect prescribes that all road taxes collected by the county treasurer on property in "any incorporated city, town, or village," shall be turned over to the treasurer of such city, town, or village "to be expended under the direction of the city council of such city, or of the board of trustees of such town or village, . . . in the improvement of the streets or bridges thereof, or of the roads approaching thereto," construed, and *held*, not to apply to civil townships. *Blue Grass Township v. Morton County*, 557.
25. Secs. 1386, 1398, R. C. 1905, construed, and *held*, to apply only to counties not formed into civil townships. Sec. 1386 merely provides that in counties not formed into townships, the board of county commissioners shall divide the county into road districts, and § 1398 merely provides the manner in which such board shall expend the road taxes collected in such counties. *Blue Grass Township v. Morton County*, 557.
26. The provision of § 6840 of the Code must be strictly complied with, to render effective an attempted service of summons by publication. *Roberts v. Enderlin Invest. Co.* 594.
27. In cases under subdivision 3 of § 6840 of the Code, the provisions thereof require that the return of the sheriff, therein specified, be filed in the action prior to the first publication of summons, in order to authorize service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 594.
28. In a case arising under subdivision 3 of § 6840 of the Code, the filing of the return of the sheriff, therein specified, prior to the first publication of the

## STATUTORY CONSTRUCTION—continued.

summons, is a jurisdictional prerequisite; and a failure to so file such summons is fatal to the validity of the service of the summons by publication. *Roberts v. Enderlin Invest. Co.* 504.

STIPULATION. See Judgment, 547.

STREET RAILWAY. See Common Carrier, 82.

## STREETS AND HIGHWAYS.

1. In making excavations in the traveled streets of a city, it is bound to do so with due regard to the rights of travelers in that vicinity, and use such reasonable precaution as is necessary for their protection. *Wells v. Lisbon*, 34.
2. In such case, ordinary care is required, which depends upon the circumstances of the particular case, dependent largely upon atmospheric and other conditions. *Wells v. Lisbon*, 34.
3. Greater care is required in such case on the part of a municipality in a snowy, dark, or stormy night than in a clear, moonlight night. *Wells v. Lisbon*, 34.
4. The evidence in this case being conflicting as to the precautions which the appellant took on a stormy night to protect travelers from injury by reason of an excavation in a traveled street in the city, it is held, that the question of defendant's negligence was properly submitted to the jury. *Wells v. Lisbon*, 34.
5. The care required of a traveler in a street of a city where excavations or other obstructions exist is such as persons of common and reasonable prudence ordinarily exercise under like circumstances, and must be proportionate to the increased danger from darkness or other atmospheric conditions. *Wells v. Lisbon*, 34.
6. When defendant's dray approached an excavation in appellant's street between 6 and 6.30 P. M. on the 2d day of January, only one light was burning to warn travelers of danger from such excavation. That light was placed in the middle of the street, where there was no excavation, but where the street had been obstructed by a plank 18 inches above the surface on which this light was hung, such plank covering the only safe part of the street; and the driver, being unable to see where the excavation was, and assuming that the light marked the place of excavation, turned away from the light; and his team, floundering in a snowdrift, fell into the excavation and was killed. The question of the contributory negligence of the driver was one for the jury, under these facts and the surrounding circumstances. *Wells v. Lisbon*, 34.

## STREETS AND HIGHWAYS—continued.

7. A witness testified as to the manner in which he had seen similar excavations in the same city protected, as one reason for supposing that the light marked the excavation. *Held*, evidence was competent to aid the jury in determining the degree of care exercised, if limited to that purpose when offered. *Wells v. Lisbon*, 34.
8. Objections to certain instructions to the jury *held* without merit. *Wells v. Lisbon*, 34.
9. Plaintiff filed a notice of claim with the city auditor in an attempt to comply with the provisions of §§ 2703, 2704, R. C. 1905. Plaintiff assigned error because two papers, each verified by the claimant, were not filed instead of one. *Held*, that inasmuch as the one notice filed contained all the information required by both sections, it was a sufficient compliance with the statute, and that it is a matter of indifference whether the whole information required to be given the city council is contained in one paper or two, if sufficient in substance to serve the purpose intended. *Wells v. Lisbon*, 34.
10. Secs. 1386, 1398, R. C. 1905, construed, and *held*, to apply only to counties not formed into civil townships. Sec. 1386 merely provides that in counties not formed into townships, the board of county commissioners shall divide the county into road districts, and § 1398 merely provides the manner in which such board shall expend the road taxes collected in such counties. *Blue Grass Township v. Morton County*, 557.

SUBSCRIPTION. See Contract, 305.

SUICIDE. See Insurance, 1235, 447.

SUMMONS. See Justice of the Peace, 111; Process, 594.

SUPREME COURT. See Appeal and Error, 70, 128, 188, 377, 560; Jurisdiction, 198; Practice, 470; Statutory Construction, 27.

1. The supreme court, in the exercise of its original jurisdiction, will, under the facts alleged in the petition, and on the application of the attorney general in the name of the state, issue its prerogative writ to enjoin an alleged new county and those assuming to act as its officers from exercising jurisdiction over the territory embraced within such new county, until the district court, in which is pending a proceeding to determine the validity of the election at which the proposition was submitted for the organ-

## SUPREME COURT—continued.

- ization of such county, has finally adjudicated such question. *State v. Miller*, 324.
2. Under the law the duty is upon the city auditor to prepare and cause to be furnished the ballots and election supplies necessary to the conduct of such election. *Held*, under the facts peculiar to this case, that this court has the jurisdiction to issue an original writ, and the same is accordingly issued. *State v. Thompson*, 426.
  3. After this court has acquired jurisdiction of a cause by appeal, it has inherent power, on proper application, to enter any appropriate order therein, including the power to vacate a stay of execution pending the determination of such appeal ordered by the trial court upon any inappropriate or insufficient undertaking, unless appellant furnishes the necessary undertaking to secure the stay of execution granted. *Schafer v. District Court*, 476.
  4. An appellate tribunal cannot go outside of the record as settled by the lower court, and be guided by statements of counsel in his brief, which have not been incorporated into and made a part of the record by such lower court. *State ex rel. Johnson v. Clark*, 517.

## TAXATION. See Streets and Highways, 557.

1. Sec. 1557, R. C. 1905, giving to the state and county a preference in the collection of personal property taxes over any and all liens on or against the personal property of the tax debtor, construed, and *held*, that the legislative intent was to create such preference right merely to the extent of the taxes assessed and levied against the particular property covered by the lien, and property included in the same class and assessed with it as one indivisible item, as disclosed by the assessment list. *Adv. Thresher Co. v. Beck*, 55.
2. On an appeal in an action to determine adverse claims, where the judgment roll only is before the supreme court, and it appears by defendant's counterclaim that the tax deed under which he claims and is in possession is a valid tax deed, and the findings show that all tax proceedings were in accordance with the statute, and that all the grounds urged by plaintiff to show defects in the tax proceedings do not exist, *held*, that defendant's title is valid, and that the deed under which he claims vested a complete title in him, and that the deed under which the plaintiff claims conveyed nothing. *Murray v. Lamson*, 125.
3. Sec. 3012, R. C. 1905, which in effect prescribes that all road taxes collected by the county treasurer on property in "any incorporated city, town, or village" shall be turned over to the treasurer of such city, town, or village, "to be expended under the direction of the city council of such city, or of

## TAXATION—continued.

the board of trustees of such town or village, . . . in the improvement of the streets or bridges thereof, or of the roads approaching thereto," construed, and *held*, not to apply to civil townships. *Blue Grass Township v. Morton County*, 557.

TAX DEED. See *Taxation*, 125.

TIME. See *Veto*, 473.

The date of the filing with the board of county commissioners of a petition for village incorporation, and not the date of the petition itself, gives such board jurisdiction to act. *State v. Clark*, 517.

TOWNSHIP. See *Streets and Highways*, 557.

TRESPASS. See *Landlord and Tenant*, 255.

TRIAL. See *Evidence*, 34, 43, 70, 72, 111, 133; *Jury*, 417; *Verdict*, 375.

1. While track and section men assume the risks incident to their occupation, and must protect themselves from approaching trains, there are exceptions in cases where circumstances and conditions are extraordinary or exceptional, in which case, the question of contributory negligence may be for the jury. *Davy v. Gt. N. Ry. Co.* 43.
2. *Held*, under the circumstances of this case the court could not say that plaintiff was guilty of contributory negligence in not watching for trains, when walking on the track 1,400 feet west of the station, and it was for the jury. *Davy v. Gt. N. Ry. Co.* 43.
3. In an action to recover damages resulting from prairie fires negligently caused by defendant's servants, evidence examined and, *held*, insufficient to justify the verdict, the record presenting a case of total failure of proof as to the extent of the damages suffered. *Spicer v. N. P. Ry. Co.* 61.
4. Four separate causes of action were pleaded, in two of which recovery for negligence in killing animals was sought; the record did not disclose upon what a verdict for \$350 was based. *Held*, error to deny defendant's motion for a new trial. *Spicer v. N. P. Ry. Co.* 61.
5. The question of defendant's negligence and plaintiff's contributory negligence is generally for the jury, and, when passed upon by it, will not ordinarily be disturbed. *Messenger v. Valley City S. & I. Ry. Co.* 82.
6. The allowance of answers to leading questions which assume facts not proven is strictly discretionary with trial judges, and unless there appears a clear



## TRIAL—continued.

- abuse of that discretion, appellate courts will not disturb their rulings. *State v. Empting*, 128.
7. Objections to questions and motions to strike out answers considered, and the rulings of the trial court sustained. *State v. Empting*, 128.
  8. The rule on cross-examination of witnesses in criminal cases is that a wide latitude is permitted as to the motives and feelings of such witnesses towards defendants, and it is prejudicial error to refuse to permit any cross-examination on those matters. *State v. Hakon*, 133.
  9. It is error to sustain an objection to a question on the cross-examination of a complaining witness, as to whether he had offered a bribe to a person if he would appear and testify as to certain matters against the defendants. *State v. Hakon*, 133.
  10. Under § 9985, R. C. 1905, providing in criminal cases that the court must only charge as to the law of the case; and by § 10026, R. C. 1905, making the jury exclusive judges of all questions of fact, the judge must express no opinion on the facts, nor weigh the evidence, nor give intimation as to the guilt of the accused. *State v. Peltier*, 188.
  11. Court's caution to the jury during the trial *held* sufficient, in the absence of a request by defendant for more definite instructions. *State v. Tracy*, 205.
  12. It was stipulated that the assured died by strychnine poisoning, whether administered by deceased, and if so, with suicidal intent, is left to mere inference by the testimony, and was a question of fact for the jury, and not of law for the court. *Held*, defendant's motion for directed verdict properly denied. *Paulson v. M. W. of A.* 235.
  13. Where a fact in issue rests solely upon inferences to be deduced from other facts, and it can be said that reasonable men might fairly differ as to the inference to be deduced from all the circumstances disclosed, it is a proper case for the jury. *Paulson v. M. W. of A.* 235.
  14. The parties to this action agreed that the value of the crop involved was \$2,500. The contract under which the defendant held reserved the title to all such crop in the plaintiff, and the defendant agreed therein not to sell or remove any of such crop until a division thereof, without written consent of the plaintiff, and not until all of his covenants and agreements contained in the lease should be fulfilled, and that the plaintiff should have the right to take and hold enough of such crop that would, on a division of same, belong to the defendant, to repay any and all advances made to him. The evidence shows that the defendant was disposing of the crop without having fulfilled the terms of the contract, and that he asserted title thereto superior and adverse to that of the plaintiff. In a replevin action a verdict was returned to the effect that the defendant's interest in the crop was \$700, and against the plaintiff. *Held*, that a ver-  
21 N. D.—49.

## TRIAL—continued.

- dict in favor of the plaintiff should have been directed. *Wadsworth v. Owens*, 255.
15. Trial courts have wide discretion as to leading questions. The complainant was eighteen years old, without education, and testified through an interpreter. She was examined about acts of illicit intercourse and the birth of a bastard child, born to her three weeks prior to the trial. Under these circumstances leading questions by the state were properly allowed. *State v. Brandner*, 310.
  16. Appellant's right to a directed verdict after the plaintiff had rested is not changed by appellant thereafter submitting evidence concerning the filing and unpaid condition of the first mortgage, a demand for payment, and an agreement for extension of the same. *Citizens Nat'l Bank v. Elev. Co.* 335.
  17. Numerous decisions of this court to the effect that, when both parties move for a directed verdict at the close of a trial, they thereby waive the right to have the facts submitted to the jury, in the absence of any request therefor, and are estopped from predicated error upon the ground that the jury was not allowed to pass upon the facts, are adhered to. *Citizens Nat'l Bank v. Elev. Co.* 335.
  18. An action begun as an equitable action may, by subsequent pleadings, be changed in nature to one at law properly triable, on demand, to a jury. *Hart v. Wyndmere*, 383.
  19. Summons and complaint were served on a single defendant; other parties joined by stipulation, on whom were served supplemental pleadings, who served answer on codefendant and original plaintiffs, and issue was joined between the original plaintiff, and all of such defendants, and between one another, without an order of court, but all parties to the action participated in the trial, offered their testimony, rested and moved for judgment. Objections by such additional parties to the jurisdiction of the court over them or the subject-matter of the action comes too late, and they will be held to have submitted to the jurisdiction of the court the determination of their action, and are bound by the verdict and judgment therein. *Hart v. Wyndmere*, 383.
  20. In bastardy proceedings, where the question of the premature birth of the children is involved, it is not error to ask the mother to state generally the length of the child at the time of birth, and to use her answers as basis for hypothetical questions propounded to a physician in order to elicit his opinion as to whether the children were in fact prematurely born. *State v. Banik*, 417.
  21. Counsel in argument must confine himself to the evidence, and not go beyond the limits of legitimate argument and comment thereon. *State v. Knudson*, 562.
  22. Where defendant alleges misconduct in the argument, and relies on the same

**TRIAL**—continued.

- for reversal, he must first seasonably object and obtain a ruling thereon, and request the court to reprimand counsel and instruct the jury or other suitable action. If the instructions given are insufficient he should in writing request additional ones. *State v. Knudson*, 562.
23. New trial will not be had for denying challenge for cause unless peremptory challenges are exhausted. *State v. Goetz*, 569.
24. The trial court properly sustained objections to certain hypothetical questions, there being no evidence upon which to base the expert testimony offered. *State v. Goetz*, 569.
25. Plaintiff's complaint was prepared to permit proof of either a written contract of sale with rescission, as provided for in such written contract, or to permit proof of an oral contract of sale and rescission thereof. Where no motion is made in advance of or on trial to compel plaintiff to elect under which contract he will submit proof, plaintiff has the right of choice, and may, as in this case, rely upon and prove such oral contract. The fact that plaintiff gave notice of rescission in the same manner provided in the written contract, and pleads such rescission, does not of itself estop plaintiff from relying on the oral contract, where such notice is not inconsistent with a rescission of such oral contract. *Westby v. Case Threshing Co.* 575.

**TROVER AND CONVERSION.**

1. In an action for damages for conversion of grain by a common carrier, intrusted to it for transportation, one of the defenses relied upon by appellant was that the grain did not belong to the plaintiff consignor, but was the property of one C. In attempting to make proof of such ownership after proper foundation laid, and after C had testified that the grain all belonged to plaintiff, C was interrogated as to whether he had made statements to the effect that he owned the grain. *Held*, that such questions were proper as going to the credibility of C as a witness, when offered for that purpose, and that it was reversible error for the trial court to sustain objections to such questions. *Taughner v. N. P. Ry. Co.* 111.
2. On proof of delivery of property to a common carrier in sound condition, and of its failure to redeliver it, a sufficient case is made to sustain a recovery for loss in an action by the shipper on his contract, with certain exceptions, which have no application in this case, but other and different proof may be necessary in such case to sustain an action for conversion against the carrier. *Taughner v. N. P. Ry. Co.* 111.
3. To constitute conversion, there must be a positive tortious act, a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or the withholding of possession

## TROVER AND CONVERSION—continued.

- under a claim of title inconsistent with that of the owner. *Taughner v. N. P. Ry. Co.* 111.
4. The gist of the action on the contract in such case is the failure to deliver, while the gist of an action in trover is the conversion, and the mere showing of a breach of contract may not prove conversion. *Taughner v. N. P. Ry. Co.* 111.
  5. If a shipper elects to sue for conversion and fails to establish the elements necessary to constitute conversion, his action must fail unless his complaint states facts necessary to sustain a recovery of the contract or some other proper form of recovery, as the burden is on the shipper, when he seeks the benefit of the measure of damages for conversion, to prove the act of conversion. *Taughner v. N. P. Ry. Co.* 111.
  6. While proof of a demand and refusal to deliver the property or thing may establish conversion in connection with other facts, the demand and refusal are only evidence of conversion when the defendant was in such condition that it might have delivered the property if it would, and conversion does not lie against a common carrier for mere nonfeasance, nor for goods stolen from the carrier, nor for negligence causing the loss, nor for bare omission. *Taughner v. N. P. Ry. Co.* 111.
  7. When goods in transit are taken from the carrier by an officer under a writ of attachment against a third party, it is incumbent on the carrier, in an action for conversion, to give immediate notice to the shipper, and on failing to give such notice so as to enable the shipper to protect himself, the carrier assumes the burden of establishing the legality of the proceedings on which the attachment was made; and the fact that the writ was regular on its face does not protect the carrier, if such writ was in law void. *Taughner v. N. P. Ry. Co.* 111.
  8. When delivery by a carrier to an officer, under a valid writ of attachment, constitutes conversion, proof of the value of the property delivered, as of the date delivered to the officer, is competent proof of value to support a recovery. *Taughner v. N. P. Ry. Co.* 111.
  9. A chattel mortgage, in this state, conveys no title, but is only a lien on the property mortgaged; hence, the purchaser of such property takes it subject to the lien of the mortgage, and there is no conversion until he does some affirmative act, like a tortious detention of the property from one entitled to its possession under the mortgage, or the exclusion or defiance of such party's right, or the withholding of possession under claim inconsistent with mortgagee's title. *Citizens Nat'l. Bank v. Elev. Co.* 335.
  10. Where mortgaged wheat is sold to an elevator company, and no act of conversion is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand

**TROVER AND CONVERSION—continued.**

and refusal. *Towne v. St. Anthony & Dak. Elev. Co.* 8 N. D. 200, 77 N. W. 608. *Citizens Nat'l. Bank v. Elev. Co.* 335.

11. Evidence of the existence of a mortgage given prior to the mortgage held by the plaintiff on wheat in controversy, without showing a default in the terms thereof, or a demand for payment of a debt secured thereby, and for possession of the security, or that the plaintiff, subsequent mortgagee, had notice or knowledge of its existence, is incompetent. *Citizens Nat'l. Bank v. Elev. Co.* 335.
12. In an action by a second mortgagee of wheat against an elevator company for converting such wheat, proof of a prior mortgage thereon, duly filed and unpaid, does not constitute a defense, but, when properly brought before the court may be shown in mitigation of damages to the extent of the amount on and secured by the prior mortgage. *Citizens Nat'l. Bank v. Elev. Co.* 335.

**TRUSTS AND TRUSTEES.** See *School Lands*, 212; *Mortgages*, 495.

Without deciding whether § 5710, R. C. 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, R. C. 1905, which provides that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, have any application to a crop raised on land and severed therefrom by one who retains possession thereof after default by him in the terms of an executory contract of purchase, and after the statutory notice has been served on him of the forfeiture and cancelation of such contract,—it is *held*, where the vendor has never been in possession of such land, and two years before the crop in controversy was severed therefrom, had commenced an action to determine adverse claims thereto, in which the only money judgment demanded was for the value of the use and occupation thereof, and he has remained silent until after the harvesting of two crops, that he has thereby elected to stand upon his right to recover for the use and occupation, and has waived his right, if any, to recover the value of the crop so raised and severed by the vendee. *Golden Valley L. & C. Co. v. Johnstone*, 101.

**ULTRA VIRES.** See *Municipal Corporations*, 383.**UNDERTAKING.** See *Claim and Delivery*, 411.

## USE AND OCCUPATION.

1. It is *held*, that the vendor, under the facts, circumstances, and pleadings of this case, cannot have a receiver to take possession of and conserve the crop so raised, after its severance, for the purpose of subjecting it to his claim for the value of the use and occupation of the premises after forfeiture by the vendee of his contract of purchase. *Golden Valley L. & C. Co. v. Johnstone*, 101.
2. In the absence of evidence of the value of the occupation of lands, the mortgagor is not entitled to any credit upon his notes. He has the burden of showing such value. *May v. Cummings*, 281.

## USE PLAINTIFF. See Quieting Title, 190.

## VENDOR AND PURCHASER.

1. Without deciding whether § 5710, R. C. 1905, which makes one who wrongfully retains a thing an involuntary trustee thereof for the benefit of the owner, and § 5711, R. C. 1905, which provides that one who gains possession of a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, have any application to a crop raised on land and severed therefrom by one who retains possession thereof after default by him in the terms of an executory contract of purchase, and after the statutory notice has been served on him of the forfeiture and cancelation of such contract, it is *held*, where the vendor, who has never been in possession of such land, and two years before the crop in controversy was severed therefrom, had commenced an action to determine adverse claims thereto, in which the only money judgment demanded was for the value of the use and occupation thereof, and he has remained silent until after the harvesting of two crops,—that he has thereby elected to stand upon his right to recover for the use and occupation, and has waived his right, if any, to recover the value of the crop so raised and severed by the vendee. *Golden Valley L. & C. Co. v. Johnstone*, 101.
2. In an action to determine adverse claims to real estate under § 31, R. C. 1905, brought by the vendor on an executory contract for the sale of land, the plaintiff cannot recover both for the value of the crop raised after forfeiture of the contract by the vendee, and for the use and occupation of the land on which the crop was raised, after severance of such crop from the land. *Golden Valley L. & C. Co. v. Johnstone*, 101.
3. It is *held*, that under the facts of this case, it is unnecessary to decide whether § 4752, R. C. 1905, which provides that the owner of the thing owns all its products and accessions, establishes title to grain raised on land and

## VENDOR AND PURCHASER—continued.

severed therefrom by one holding possession thereof after forfeiture of an executory contract of purchase, in the vendor as against his vendee, when such vendor has never been in possession of the land; but a review of the authorities discloses them overwhelmingly in favor of ownership in the grower of the crop. *Golden Valley L. & C. Co. v. Johnstone*, 101.

4. The vendor, under an executory contract for the sale of land, who is not and never has been in possession thereof, under the facts disclosed in this case and set forth in the opinion, has no lien upon the crop raised and severed by the vendee in possession, as security for the value of the use and occupation. *Golden Valley L. & C. Co. v. Johnstone*, 101.
5. It is held, that the vendor, under the facts, circumstances and pleadings of this case, cannot have a receiver to take possession of and conserve the crop so raised, after its severance, for the purpose of subjecting it to his claim for the value of the use and occupation of the premises after forfeiture, by the vendee of his contract of purchase. *Golden Valley L. & C. Co. v. Johnstone*, 101.
6. In October, 1905, plaintiff contracted with C. for the sale of real property. The contract contains stipulation against its assignment by C., and authorizes plaintiff to forfeit, in case of default, by giving thirty days' notice of intention so to do. C. took possession under the contract, and in July, 1906, sold his interest to G., giving him a contract for the deed, and put him in possession, G. having remained in occupancy ever since. C. defaulted in his instalments due October, 1907, and February, 1908. Plaintiff served notice of forfeiture on C. alone, although she knew of G's purchase, and at no time objected thereto. Plaintiff brought suit against C. alone to declare the contract forfeited, in which action C. defaulted, and plaintiff took judgment for the relief prayed for. The case at bar was subsequently commenced against both C. and G. to foreclose any interest asserted by either. G. alone defends, and offers to pay all that is due under her contract with C. *Held*, for reasons stated in the opinion, plaintiff cannot recover, and G. is entitled to the relief prayed for. *Williams v. Corey*, 509.
7. Secs. 7494, and 7495, R. C. 1905, which prescribes the manner in which such contracts may be forfeited, provides for the service of written notice by the vendor upon "the vendee or purchaser, or his assigns." *Held*, construing said sections, that the word "assigns" as thus used includes within its meaning vendees of the purchaser when known to the vendor, and that, in order to forfeit such contract as against the rights of G., it was incumbent on plaintiff to cause notice to be served on him as required by said statute. *Williams v. Corey*, 509.

**VENUE, CHANGE OF.** See Affidavits, 261.

Filing an affidavit of prejudice against the presiding judge and the county does not divest the former of authority to transfer the case to another county for trial. *State v. White*, 444.

**VERDICT.** See Appeal and Error, 383; Criminal Law, 128; Parties, 383.

1. In an action to recover damages resulting from prairie fires negligently caused by defendant's servants, evidence examined, and *held*, insufficient to justify the verdict, the record presenting a case of total failure of proof as to the extent of the damages suffered. *Spicer v. N. P. Ry. Co.* 61.
2. Four separate causes of action were pleaded, in two of which recovery for negligence in killing animals was sought. The record did not disclose upon what a verdict of \$350 was based. *Held*, error to deny defendant's motion for a new trial. *Spicer v. N. P. Ry. Co.* 61.
3. Evidence reviewed, and *held* sufficient to sustain the verdict. *State v. Winney*, 72.
4. Under § 8804, R. C. 1905, on finding the accused guilty of murder in the first degree, the jury must designate in their verdict the punishment, either by death, or by imprisonment for life. *Held*, the only duty of the court is to inform the jury of the two modes of punishment, and it is left to that body to determine which. *State v. Peltier*, 188.
5. It was stipulated that assured died by strychnine poisoning, whether administered by deceased, and if so, with suicidal intent, is left to mere inference by the testimony, and was a question of fact for the jury, and not of law for the court. *Held*, defendant's motion for directed verdict properly denied. *Paulson v. M. W. of A.* 235.
6. Evidence in this case does not show such a contract, and the trial court properly directed the jury to find for the defendant. *Kane v. Sherman*, 249.
7. The parties to this action agreed that the value of the crop involved was \$2,500. The contract under which the defendant held reserved the title to all such crop in the plaintiff, and the defendant agreed therein not to sell or remove any of such crop until a division thereof, without written consent of the plaintiff, and not until all of his covenants and agreements contained in the lease should be fulfilled; and that the plaintiff should have the right to take and hold enough of such crop as would, on a division of the same, belong to the defendant, to repay any and all advances made to him. The evidence shows that the defendant was disposing of the crop without having fulfilled the terms of the contract, and that he as-



## VERDICT—continued.

- serted title thereto superior and adverse to that of the plaintiff. In a replevin action a verdict was returned to the effect that the defendant's interest in the crop was \$700, and against the plaintiff. *Held*, that a verdict in favor of the plaintiff should have been directed. *Wadsworth v. Owens*, 255.
8. The jury are not bound to believe or to disbelieve the entire evidence of any witness. It is their duty to examine all of the evidence offered, and to arrive at the truth regarding the matter in dispute. Evidence examined and found to sustain the verdict of the jury. *State v. Brandner*, 310.
  9. Where mortgaged wheat is sold to an elevator company, and no act of conversion is shown until a demand and refusal to deliver, it is error to direct a verdict for the plaintiff mortgagee suing for conversion, when the only evidence of value relates to a time practically a month prior to demand and refusal. *Towne v. St. Anthony & Dak. Elev. Co.* 8 N. D. 200, 77 N. W. 608. *Citizens Nat'l Bank v. Elev. Co.* 335.
  10. Appellant's right to a directed verdict after the plaintiff had rested is not changed by appellant thereafter submitting evidence concerning the filing and unpaid condition of the first mortgage, a demand for payment, and an agreement for extension of the same. *Citizens Nat'l Bank v. Elev. Co.* 335.
  11. Numerous decisions of this court to the effect that, when both parties move for a directed verdict at the close of a trial, they thereby waive the right to have the facts submitted to the jury, in the absence of any request therefor, and are estopped from predicated error upon the ground that the jury was not allowed to pass upon the facts, are adhered to. *Citizens Nat'l Bank v. Elev. Co.* 335.
  12. The statutory provision, § 7031 of the North Dakota Revised Statutes of 1905, requiring that a verdict must be signed by the foreman of the jury, is directory, not mandatory, and an unsigned verdict properly rendered and received, that would otherwise be valid, is not invalidated by such statutory provision. *Hart v. Wyndmere*, 383.
  13. Evidence examined and *held* sufficient to sustain the verdict rendered, and judgment ordered thereon. *Hart v. Wyndmere*, 383.
  14. Evidence examined, and *held* sufficient to justify the verdict. *State v. Banik*, 417.
  15. Evidence examined, and *held* insufficient to sustain the verdict. *Luick v. Arends*, 614.

## VETO.

- Sec. 79, Constitution of North Dakota, provides: "If any bill shall not be returned by the governor within three days (Sundays excepted) after it

## VETO—continued.

shall have been presented to him, the same shall be a law unless the legislative assembly, by its adjournment, prevent its return, in which case it shall be a law unless he shall file the same with his objections, in the office of the secretary of state, within fifteen days after such adjournment." *Held*, construing said constitutional provision, that in computing the fifteen days' period in which the governor may exercise the veto power after the adjournment of the legislative assembly, Sundays are not excepted. Consequently the attempted veto of house bill No. 410, relating to abstracters of titles, passed by the twelfth legislative assembly on March 3d, became a law on March 18th, and the attempted exercise by the governor of his veto power as to such bill on March 21st is of no force or effect. *State v. Norton*, 473.

VILLAGES. See Municipal Corporations, 383, 517.

VOTERS AND ELECTORS. See Counties, 324; County Superintendent, 150; Officers, 150.

1. On the question of the division of counties, as governed by §§ 2329, 2330, 2331, R. C. 1905, the election under § 2329, does not confer a legal existence on the new or proposed county. *Murray v. Davis*, 64.
2. Until such county commissioners qualify, voters residing in a proposed new county are legal voters of the county about to be divided, and can legally vote on all matters pertaining to that county. *Murray v. Davis*, 64.
3. A person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity. The word "elected," as used in § 764, R. C. 1905, signifies an election of a qualified successor to the incumbent. *Jenness v. Clark*, 150.
4. Qualified electors, as defined by § 121 of the Constitution, are male persons only, possessing the other qualifications therein enumerated. *Wagar v. Prindeville*, 245.
5. Women entitled to vote for school officers under the provisions of § 123 of the Constitution constitute a class separate from electors, as above defined, and only possess a limited elective franchise. *Wagar v. Prindeville*, 245.
6. The registration law, §§ 732 to 746, inclusive, R. C. 1905, do not require women to register or furnish an affidavit, as required of electors, who are not registered, to entitle them to vote for school officers. *Wagar v. Prindeville*, 245.
7. Chapter 45 of the Sessions Laws of 1907, providing for the commission system of city government, does not authorize cumulative voting in the election of city commissioners. *State v. Thompson*, 426.
8. Under the law the duty is upon the city auditor to prepare and cause to be

## VOTES AND ELECTORS—continued.

furnished the ballots and election supplies necessary to the conduct of such election. *Held*, under the facts peculiar to this case, that this court has the jurisdiction to issue an original writ, and the same is accordingly issued. *State v. Thompson*, 426.

**WAIVER.** See Appeal and Error, 27; Jurisdiction, 387; Practice, 208, 348; Preliminary Examination, 161; Trial, 335; Vendor and Purchaser, 101.

1. Whether a verdict in a criminal case is against the evidence or not will not be reviewed on appeal, unless the motion for a new trial specifies as error that the verdict is against the evidence; and failure by the state to object to the motion for a new trial when made, without any specification, is not a waiver of the right to raise the question in this court. *State v. Empting*, 128.
2. The incumbent of a public office, who has the right to hold over until his successor is elected and qualified, has such a special interest as enables him to maintain an action under the provisions of chap. 25, Code Civ. Proc. (§§ 7349 et seq. R. C. 1905), against one who intrudes himself into such office, unless such right has been lost or waived in some manner either by the voluntary surrender of the office, or by some other equivalent act. *Jenness v. Clark*, 150.
3. Failure to exercise a peremptory challenge is a waiver of previous objection to a juror to whom a challenge for cause had been taken and disallowed. *State v. Goetz*, 569.

**WARRANTY.** See Covenants, 531; Mortgages, 483; Sales, 383, 478, 575.

**WILLS.** See Equity, 359.

The real property described in the real-estate mortgage in suit was owned, at the time of his death, by one Gustaveus Pehrsson, husband of one of the defendants and father of the others, who died testate in 1895. By the terms of his will his executrix was directed, on or before a certain date, to sell such real property and to distribute the proceeds among his children. *Held*, that such provision operated, at the death of the testator, as an equitable conversion of such real property into personalty for the purposes of its administration. *Held*, further, that, notwithstanding this fact, such mortgage will be treated in equity as an hypothecation by the mortgagors of whatever interests in such estate they possessed at the

**WILLS—continued.**

date of such mortgage, to the extent of the proceeds of such real property. *Wood v. Pehrsson*, 357.

**WITNESSES.** See Evidence, 70, 72, 111; Trial, 310.

1. An instruction as to the corroboration of witnesses, which states that if any witness has "wilfully testified falsely," is sufficient, and it need not be stated that such testimony must be wilfully and intentionally false. *State v. Winney*, 72.
2. An instruction which states that "if any witness has wilfully testified falsely, etc., the jury are at liberty to wholly disregard his testimony, except so far as the same is corroborated by other credible testimony in the case," is not erroneous by reason of the use of the word "testimony" in place of the word "evidence," as these words mean the same, as commonly understood. *State v. Winney*, 72.
3. It is discretionary with the trial courts whether or not all witnesses shall be excluded from the court room during the trial. *State v. Hakon*, 133.
4. The rule on cross-examination of witnesses in criminal cases is that a wide latitude is permitted as to the motives and feelings of such witnesses towards defendants, and it is prejudicial error to refuse to permit any cross-examination on those matters. *State v. Hakon*, 133.
5. It is error to sustain an objection to a question on the cross-examination of a complaining witness, as to whether he had offered a bribe to a person if he would appear and testify as to certain matters against the defendants. *State v. Hakon*, 133.
6. *Held*, that the court did not, in its instructions, misplace the burden of proof, and that defendant was not entitled to a new trial because of the nonappearance of a witness under subpoena. *State v. Goetz*, 569.

**WORDS AND PHRASES.** See Brokers, 294; Factors, 294.

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3. A person who is ineligible to hold a public office cannot be elected thereto, and his election is a nullity. The word "elected" as used in § 764, R.

## WORDS AND PHRASES—continued.

- C. 1905, signifies an election of a qualified successor to the incumbent. *Jenness v. Clark*, 150.
4. "Qualified electors," as defined by § 121 of the Constitution, are male persons only, possessing the other qualifications therein enumerated. *Wagar v. Prindeville*, 245.
  5. "Collusion" is an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." *Wiemer v. Wiemer*, 371.
  6. Sec. 4058, R. C. 1905. The evidence in this case failing to show any agreement between the husband and wife that one of them should commit, or appear to have committed, acts constituting a cause for divorce, and it not appearing that the defendant was represented as having committed acts for such purposes which she had not committed, no collusion is shown. *Wiemer v. Wiemer*, 371.
  7. The expression "rights of another," in the maxim set forth in § 6661, R. C. 1905, means legal rights, and is not broad enough to include all rights determined by our moral and ethical standards. *Langer v. Goode*, 462.
  8. Secs. 7494, 7495, R. C. 1905, which prescribe the manner in which such contracts may be forfeited, provides for the service of written notice by the vendor upon "the vendee or purchaser, or his assigns." *Held*, construing said sections, that the word "assigns," as thus used, includes within its meaning vendees of the purchaser when known to the vendor, and that, in order to forfeit such contract as against the rights of G., it was incumbent on plaintiff to cause notice to be served on him as required by said statute. *Williams v. Corey*, 509.
  9. A citizen and taxpayer of the territory known as North Minot is a party beneficially interested under § 7811, R. C. 1905, requiring that "the application must be made and filed by the party beneficially interested." *State v. Clark*, 517.
  10. The word "mortgagor," as used in § 7454, R. C. 1905, relative to enjoining real-estate mortgage foreclosure sales, includes those persons in privity to and claiming under the mortgagor. *State v. Buttz*, 540.

E. J. G.

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